

v. 2816

No. 13600

United States
Court of Appeals
for the Ninth Circuit

ANGLO CALIFORNIA NATIONAL BANK OF
SAN FRANCISCO, Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corporation,
Appellee.

CHARLES W. EBNOTHER, Trustee of the
Estate of Hedgeside Distillery Corporation,
Bankrupt, Appellant,

vs.

SCHENLEY INDUSTRIES, INC., a corporation,
Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 480, inclusive)

Appeals from the United States District Court for the Northern
District of California, Northern Division

JUL - 9 1953

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for
the Northern District of California,
Northern Division

In Bankruptcy—No. 11327

In the Matter of

HEDGESIDE DISTILLERY CORPORATION, a
corporation,
Bankrupt.

RECLAMATION PETITION

To Bernard J. Abrott, Esq., Referee in Bankruptcy:

The petition of Schenley Industries, Inc., a corporation, respectfully represents:

I.

Petitioner herein, Schenley Industries, Inc., is a corporation authorized to do and doing business within the State of California. Prior to January 4, 1949, the corporate name of petitioner was "Schenley Distillers Corporation" and on said date the corporate name of petitioner was changed to "Schenley Industries, Inc."

II.

On or about May 17, 1949, an involuntary petition in bankruptcy was filed in this court by Rheem Manufacturing Company, Charles J. Youngberg and Capitol Cigar & Liquor Company, creditors of Hedgeside Distillery Corporation, a corporation, praying that said corporation be adjudged a bankrupt, and on June 2, 1949, said Hedgeside Distillery

Corporation was duly adjudicated a bankrupt and on said day these proceedings were duly referred to Bernard J. Abrott, Esq., Referee in Bankruptcy.

III.

On July 26, 1949, Charles W. Ebnother, Esq., was duly appointed trustee of the property of said bankrupt and has qualified and is now the duly appointed, qualified and acting trustee in bankruptcy of said Hedgeside Distillery Corporation, Bankrupt.

IV.

At the time of the filing of said petition in bankruptcy herein, said bankrupt had in its possession, and said trustee now has in his possession, the following property belonging to petitioner, to wit:

2,893 barrels of whiskey, and
6,040 barrels of grain spirits

8,933 Total

stored in bond for petitioner in Internal Revenue Bonded Warehouse No. 2, Hedgeside Distillery Corporation, Napa, California, the serial numbers of said barrels being set out in Exhibit A, incorporated by reference herein and made a part hereof for all purposes.

V.

Said barrels of whiskey and grain spirits are covered by warehouse receipts issued by the bankrupt to petitioner and now held by petitioner, the serial numbers of said warehouse receipts being fully set out in Exhibit A.

VI.

Petitioner was at the time of the filing of said petition in bankruptcy herein, and is now the owner of said barrels of whiskey and grain spirits, and is entitled to the immediate possession of said property.

VII.

Petitioner has made demand on said trustee for the surrender of said 8,993 barrels of whiskey and grain spirits, but said trustee has failed and refused to surrender the same.

VIII.

Your petitioner is informed and believes and therefore represents the fact to be, that Anglo California National Bank of San Francisco, No. 1 Sansome Street, San Francisco, California, claims an interest in said property adverse to petitioner, and is therefore a proper party to this proceeding.

Wherefore, your petitioner prays for an order upon said Charles W. Ebnother, Trustee, requiring him to surrender said 8,933 barrels of whiskey and grain spirits to petitioner, and for such other and further relief as is just.

Dated: San Francisco, California, September 26, 1949.

SCHENLEY INDUSTRIES, INC.,

[Seal] By JAS. E. WOOLSEY,

Assistant Secretary.

BRONSON, BRONSON & MCKIN-
NON,

/s/ By KIRKE La SHELLE.

Duly Verified.

EXHIBIT A

Number of Barrels	Warehouse Receipt Numbers	Date of Issue of Ware- house Receipt	Serial Numbers of Barrels
Whiskey:			
125	3681B	12/22/48	398 to 522 inclusive
425	3682B	12/22/48	523 to 947 inclusive
45	3511B	11/20/47	948 to 992 inclusive
310	3682B	12/22/48	994 to 1303 inclusive
882	3683B	12/22/48	1304 to 2185 inclusive
1,017	3684B	12/22/48	2186 to 3202 inclusive
40	3512B	11/20/47	3777 to 3816 inclusive
49	3512B	11/20/47	3906 to 3954 inclusive
<hr/>			
2,893			
Grain Spirits:			
42	3381B	3/18/47	4351 to 4392 inclusive
38	3383B	3/19/47	4393 to 4430 inclusive
42	3384B	No Date	4431 to 4472 inclusive
36	3385B	3/21/47	4473 to 4508 inclusive
46	3392B	3/24/47	4509 to 4554 inclusive
26	3393B	3/25/47	4555 to 4580 inclusive
46	3398B	3/26/47	4581 to 4626 inclusive
27	3399B	3/27/47	4627 to 4653 inclusive
25	3400B	3/27/47	4654 to 4678 inclusive
31	3402B	3/28/47	4679 to 4709 inclusive
31	3403B	3/28/47	4710 to 4740 inclusive
37	3404B	3/31/47	4741 to 4777 inclusive
32	3407B	4/ 1/47	4778 to 4809 inclusive
85	3671B	12/ 6/48	5735 to 5819 inclusive
15	3671B	12/ 6/48	5837 to 5851 inclusive
2	3673B	12/ 7/48	5852 to 5853 inclusive
17	3673B	12/ 7/48	5888 to 5904 inclusive
18	3673B	12/ 7/48	5940 to 5957 inclusive
60	3673B	12/ 7/48	5976 to 6035 inclusive
3	3673B	12/ 7/48	6239 to 6241 inclusive
68	3674B	12/ 8/48	6242 to 6309 inclusive
19	3674B	12/ 8/48	6351 to 6369 inclusive
13	3674B	12/ 8/48	6432 to 6444 inclusive
28	3675B	12/ 9/48	6445 to 6472 inclusive

Number of Barrels	Warehouse Receipt Numbers	Date of Issue of Ware- house Receipt	Serial Numbers of Barrels
Grain Spirits—(Continued)			
44	3675B	12/ 9/48	6495 to 6538 inclusive
28	3675B	12/ 9/48	6560 to 6587 inclusive
20	3676B	12/10/48	6588 to 6607 inclusive
32	3676B	12/10/48	6966 to 6997 inclusive
48	3676B	12/10/48	7031 to 7078 inclusive
73	3678B	12/17/48	7079 to 7151 inclusive
20	3678B	12/17/48	7169 to 7188 inclusive
4	3678B	12/17/48	7382 to 7385 inclusive
3	3678B	12/17/48	7388 to 7390 inclusive
100	3679B	12/20/48	7391 to 7490 inclusive
50	3679B	12/20/48	7713 to 7762 inclusive
50	3680B	12/21/48	7763 to 7812 inclusive
50	3685B	12/22/48	7813 to 7862 inclusive
6	3685B	12/22/48	7863 to 7868 inclusive
44	3685B	12/22/48	7888 to 7931 inclusive
123	3686B	12/23/48	7932 to 8054 inclusive
27	3686B	12/23/48	8082 to 8108 inclusive
12	3687B	12/27/48	8109 to 8120 inclusive
35	3687B	12/27/48	8146 to 8180 inclusive
105	3364B	2/24/47	62257 to 62361 inclusive
100	3366B	2/25/47	62362 to 62461 inclusive
38	3365B	2/25/47	62462 to 62499 inclusive
44	3386B	3/21/47	64201 to 64244 inclusive
94	3391B	3/24/47	64245 to 64338 inclusive
38	3394B	3/25/47	64339 to 64376 inclusive
58	3395B	3/25/47	64377 to 64434 inclusive
59	3396B	3/25/47	64435 to 64493 inclusive
96	3397B	3/26/47	64494 to 64589 inclusive
90	3401B	3/27/47	64590 to 64679 inclusive
92	3405B	3/31/47	64680 to 64771 inclusive
100	3406B	4/ 1/47	64772 to 64871 inclusive
48	3408B	4/ 2/47	64872 to 64919 inclusive
50	3409B	4/ 2/47	64920 to 64969 inclusive
44	3410B	4/ 2/47	64970 to 65013 inclusive
90	3412B	4/ 3/47	65014 to 65103 inclusive
10	3414B	4/ 7/47	65104 to 65113 inclusive
57	3420B	4/ 9/47	65385 to 65441 inclusive
80	3435B	4/17/47	65921 to 66000 inclusive

Number of Barrels Grain	Warehouse	Date of Issue	Serial
	Receipt Numbers	of Ware- house Receipt	Numbers of Barrels
Spirits—(Continued)			
50	3480B	10/27/47	68747 to 68796 inclusive
20	3481B	10/27/47	68797 to 68816 inclusive
16	3482B	10/28/47	68817 to 68832 inclusive
50	3484B	10/28/47	68833 to 68882 inclusive
35	3486B	10/29/47	68883 to 68917 inclusive
56	3505B	11/17/47	69856 to 69911 inclusive
81	3509B	11/19/47	69985 to 70065 inclusive
70	3510B	11/20/47	70066 to 70135 inclusive
69	3525B	11/24/47	70228 to 70296 inclusive
137	3529B	11/28/47	70350 to 70486 inclusive
69	3430B	11/28/47	70487 to 70555 inclusive
27	3538B	No Date	70942 to 70968 inclusive
50	3539B	12/ 8/47	70969 to 71018 inclusive
74	3541B	12/10/47	71069 to 71142 inclusive
96	3543B	12/11/47	71143 to 71238 inclusive
85	3544B	12/12/47	72139 to 71323 inclusive
173	3545B	12/15/47	71324 to 71496 inclusive
3	3670B	12/ 3/48	71798 to 71800 inclusive
100	3665B	12/ 1/48	71852 to 71951 inclusive
149	3669B	12/ 2/48	71952 to 72100 inclusive
1	3669B	12/ 2/48	72199
59	3670B	12/ 3/48	72200 to 72258 inclusive
9	3567B	2/16/48	72880 to 72888 inclusive
76	3568B	2/16/48	72889 to 72964 inclusive
83	3569B	2/17/48	72965 to 73047 inclusive
67	3572B	2/23/48	73173 to 73239 inclusive
81	3573B	2/24/48	73240 to 73320 inclusive
86	3575B	2/25/48	73384 to 73469 inclusive
11	3590B	3/ 8/48	73910 to 73920 inclusive
86	3592B	3/ 9/48	73971 to 74056 inclusive
63	3593B	3/10/48	74057 to 74119 inclusive
85	3597B	3/16/48	74237 to 74321 inclusive
47	3598B	3/17/47	74322 to 74368 inclusive
110	3602B	3/22/48	74487 to 74596 inclusive
80	3605B	3/23/48	74643 to 74722 inclusive
91	3606B	3/24/48	74723 to 74813 inclusive
83	3670B	12/ 3/48	74913 to 74995 inclusive
84	3610B	4/ 8/48	75462 to 75545 inclusive

Number of Barrels	Warehouse Receipt Numbers	Date of Issue of Ware- house Receipt	Serial Numbers of Barrels
Grain Spirits—(Continued)			
80	3616B	4/ 9/48	75546 to 75625 inclusive
31	3617B	4/12/48	75626 to 75656 inclusive
75	3618B	4/14/48	75657 to 75731 inclusive
84	3619B	4/15/48	75732 to 75815 inclusive
25	3621B	4/16/48	75816 to 75840 inclusive
59	3622B	4/20/48	75882 to 75940 inclusive
59	3623B	4/22/48	75941 to 75999 inclusive
55	3624B	4/23/48	76000 to 76054 inclusive
86	3629B	5/ 6/48	76294 to 76379 inclusive
25	3631B	5/10/48	76449 to 76473 inclusive

6,040

Total 8,933

[Endorsed]: Filed Oct. 9, 1949.

[Title of District Court and Cause.]

ANSWER OF CHARLES W. EBNOTHER AS
TRUSTEE OF HEDGESIDE DISTILLERY
CORPORATION, A CORPORATION,
BANKRUPT, TO RECLAMATION PETI-
TION FILED BY SCHENLEY INDUS-
TRIES, INC.

Now comes Charles W. Ebnoter, as Trustee of Hedgeside Distillery Corporation, a corporation, the above named bankrupt, and for his answer to said Reclamation Petition filed by said Schenley Industries, Inc., admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I, II, III, VII and VIII of said Reclamation Petition.

II.

Denies generally and specifically, each and every, all and singular the allegations contained in paragraph IV. of said Reclamation Petition.

III.

Answering paragraph V of said Petition of Reclamation, respondent admits that the barrels of whiskey and grain spirits set out in Exhibit "A" attached to said Petition for Reclamation are covered by warehouse receipts issued by the above named bankrupt corporation to said petitioner; and in this respect alleges that said warehouse receipts issued to said petitioner and covering said whiskey and grain spirits set out in Exhibit "A" attached to said petition for reclamation were and are now void as against the unsecured creditors of said bankrupt corporation in that at the time said warehouse receipts were issued, the barrels of whiskey and spirits described in Exhibit "A" attached to said Reclamation Petition were and now are the property of said bankrupt corporation and there was no transfer accompanied by any delivery or change of possession from said bankrupt corporation to said petitioner herein as required by the provisions of Section 3440 of the Civil Code of the State of California.

IV.

Denies generally and specifically each and every, all and singular the allegations contained in paragraph VI of said reclamation petition.

Wherefore, your petitioner as such Trustee of

Hedgeside Distillery Corporation, a corporation, the above named bankrupt, prays that the reclamation petition of Schenley Industries, Inc. be denied and that the legal title to the 8,933 barrels of whiskey and grain spirits described in said reclamation petition and Exhibit "A" attached thereto, in possession of the above named bankrupt at the time of the filing of the involuntary petition in bankruptcy and now in the possession and under the control of said respondent as Trustee in bankruptcy of the above named bankrupt, be adjudicated in your respondent as such Trustee, free and clear of any and all liens and claims of every nature and description whatsoever by Schenley Industries, Inc. and the said Anglo California National Bank of San Francisco.

HEDGESIDE DISTILLERY CORPORATION, a corporation,

/s/ By CHARLES W. EBNOTHER,
Trustee.

FRANCIS P. WALSH,
HENRY GROSS,

Attorneys for Trustee,

/s/ By FRANCIS P. WALSH.

Duly Verified.

[Endorsed]: Filed Oct. 18, 1949.

[Title of District Court and Cause.]

ANSWER TO RECLAMATION PETITION

Now comes The Anglo California National Bank of San Francisco, a national banking association, appearing specially herein only for the purpose of answering an Order to Show Cause of the Honorable Bernard J. Abrott, Referee in Bankruptcy, why petition of Schenley Industries, Inc., a California corporation, for reclamation of property should not be granted, and for its answer to said reclamation petition admits, denies and alleges as follows:

1. States that your answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph I of said reclamation petition and on that ground denies said allegations and each thereof.

2. Admits the allegations of Paragraph II of said reclamation petition.

3. Admits the allegations of Paragraph III of said reclamation petition.

4. Denies each of the allegations of Paragraph IV of said reclamation petition.

5. States that your answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of said reclamation petition and on that ground denies each of said allegations; and as further answer to said Paragraph V your answering defendant states that it is informed and believes and on that ground alleges that any issuance

by the bankrupt of the warehouse receipts on barrels of whiskey mentioned in Exhibit A attached to said petition is void as such receipts are subsequent to warehouse receipts issued by the bankrupt to your answering defendant to secure repayment of money advances made by your answering defendant to the bankrupt; said receipts as issued are numbered 3469B, 3470B, 3472B, 3474B, 3475B, 3576B and 3477B; and on the same ground further alleges that the warehouse receipts on whiskey and grain spirits mentioned in said Exhibit "A", together with those issued to petitioner's predecessors in title, were and are now void as against the unsecured creditors of the bankrupt in that at the time said warehouse receipts were issued the said barrels of whiskey and spirits purported to be transferred by same were the property of the bankrupt and there was no delivery followed by any actual and/or continued change of possession of said barrels of whiskey or grain spirits.

6. States that your answering defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VI of said reclamation petition and on that ground denies said allegations and each thereof, and as a part of said denial denies that petitioner Schenley Industries, Inc. is entitled to the immediate possession of any barrels of whiskey and/or grain spirits in the possession of the trustee in bankruptcy and on the premises of the bankrupt at Napa, California.

7. States that your answering defendant is with-

out knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII of said reclamation petition and on that ground denies said allegations and each thereof.

8. Answering Paragraph VIII of said reclamation petition admits that your answering defendant claims an interest in the 8,933 barrels of whiskey and grain spirits as to which Schenley Industries, Inc. seeks the surrender of by the trustee in bankruptcy; and in this connection alleges that your answering defendant on or about the dates hereinafter mentioned loaned to the bankrupt in good faith the sums of money set forth and received as security for the repayment of said sums a pledge of the whiskey and grain spirits covered respectively by the warehouse receipts listed below:

Whiskey

Original Note Date	Amount Advanced	Warehouse Receipt			
		No.	Date	Barrels	Serial No.
6/18/47	\$ 7,980.	3469B	6/17/47	266	298-563
7/ 8/47	19,470.	3470B	7/17/47	694	564-947
7/30/47	3,000.	3472B	7/30/47	100	994-1303 1304-1403
9/10/47	3,000.	3474B	9/10/47	100	1404-1503
9/17/47	6,000.	3475B	9/16/47	200	1504-1703
9/17/47	6,000.	3476B	9/16/47	200	1704-1903
10/22/47	6,000.	3477B	10/23/47	200	1904-2103
12/18/47	6,000.	3548B	12/17/47	200	2104-2303
9/17/48	42,253.	3652B	9/16/48	899	2304-3202
	\$99,703.			2859	

Grain Spirits

1/ 5/49	\$18,130.	3689B	1/ 5/49	574	70228-70296 70942-71018 71069-71496
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No part of said amounts so advanced have been repaid and said sums and all thereof are now due, owing and unpaid.

Wherefore, The Anglo California National Bank of San Francisco having fully answered, prays that the petitioner take nothing by its petition for reclamation.

Dated: October 18th, 1949.

/s/ FREDERICK M. FISK,

/s/ CHICKERING & GREGORY,

Attorneys for The Anglo California National Bank of San Francisco, appearing herein specially.

Duly Verified.

[Endorsed]: Filed Oct. 18, 1949.

[Title of District Court and Cause.]

ORDER ON RECLAMATION PETITION

The verified petition of Schenley Industries, Inc., a corporation, hereinafter referred to as Petitioner, for reclamation from the trustee, filed herein on September 27, 1949, having come on regularly for hearing before the Honorable Bernard J. Abrott, Referee in Bankruptcy, at Oakland, California, commencing on October 19, 1949, and continuing from time to time thereafter until concluded on December 11, 1950, on said verified petition and the verified answers in opposition thereto of the Anglo California National Bank of San Francisco, herein-

after referred to as "Anglo Bank", and Charles W. Ebnother, Esquire, as Trustee in bankruptcy of the above named bankrupt, and upon all the other papers, records, and files herein, and petitioner appearing by its counsel, Messrs. Bronson, Bronson & McKinnon, by and through Kirke LaShelle, Esquire, and John F. Ward, Esquire, and said Anglo Bank appearing by its counsel Messrs. Chickering and Gregory, by and through Frederick M. Fisk, Esquire and Bruce M. Casey, Jr., Esquire, and said Trustee appearing in person and by his counsel Francis P. Walsh, Esquire, and evidence, both oral and documentary, having been submitted to the Court by petitioner in support of said petition, by Anglo Bank in support of its adverse claim in opposition to said petition, and by the Trustee in opposition to said petition, and the Court having received the oral and written arguments of counsel for said parties and having duly considered all of the evidence and said arguments, and the cause having been submitted for decision, the Court now makes its

FINDINGS OF FACT

1. Petitioner herein is now and at all times herein mentioned was a corporation authorized to do and doing business within the State of California. Prior to January 4, 1949, the corporate name of petitioner was "Schenley Distillers Corporation" and on said date the corporate name of petitioner was changed to "Schenley Industries, Inc."

2. The bankrupt, Hedgeside Distillery Corporation, hereinafter referred to as "Hedgeside", was

duly adjudicated as a bankrupt on or about June 2, 1949, an involuntary petition in bankruptcy having been filed in the above entitled court by three of its creditors on or about May 17, 1949; on or about June 2, 1949, said bankruptcy proceedings were duly referred to the Honorable Bernard J. Abrott, Referee in Bankruptcy; on or about July 26, 1949, Charles W. Ebnoter, Esquire, was duly appointed trustee of the property of said bankrupt, and thereafter qualified and is now, and at all times during the pendency of the reclamation petition has been, the duly appointed, qualified and acting trustee in bankruptcy of said bankrupt; the Anglo Bank is, and at all times mentioned herein was, a national banking association with its principal office at San Francisco, California.

3. At the time of the filing of said involuntary petition in bankruptcy, to-wit: on or about May 17, 1949, the bankrupt had in its possession and the trustee has at all times since July 26, 1949 and now has in his possession the following described property:

8,933 barrels of whiskey and grain spirits stored in bond by the bankrupt for petitioner in Internal Revenue Bonded Warehouse No. 2, Hedgeside Distillery Corporation, Napa, California, the serial numbers of said barrels and warehouse receipt data being set out in Exhibit A hereto, incorporated by this reference herein and made a part hereof for all purposes;

Petitioner has made demand on the trustee for the surrender of said 8,933 barrels of whiskey and

grain spirits, and said trustee has failed and refused to surrender the same to petitioner.

4. Said 8,933 barrels of whiskey and grain spirits were purchased for value by petitioner from the respective owners thereof as set forth below; said owners intended to transfer the ownership and legal title thereto to petitioner on the respective dates of the transactions set forth below in exchange for the purchase price which said owners received, and at the time of the filing of said petition in bankruptcy said 8,933 barrels stored in bond in Internal Revenue Bonded Warehouse No. 2 were covered by warehouse receipts issued to petitioner by Hedgeside and now held by petitioner, the serial numbers and dates of issue of said warehouse receipts being set out in Exhibit A hereto, incorporated by this reference herein and made a part hereof for all purposes; said purchases and sales were made in the following manner:

(a) Petitioner purchased a total of 4,815 barrels of said spirits from Hedgeside, the Bankrupt;

Beginning in March, 1947, petitioner purchased 1,293 barrels of said spirits from Hedgeside pursuant to a production contract for grain spirits dated September 17, 1945 (Petitioner's Exhibit Nos. 14 and 15) as amended (Petitioner's Exhibit Nos. 16, 17, 18, 19, 20 and 21), the documentary evidence of said purchase and sale, including warehouse receipts covering said spirits, being contained in petitioner's Exhibit No. 52; beginning in October, 1947, petitioner purchased 3,191 barrels of said spirits from Hedgeside pursuant to a production

contract for grain spirits dated October 13, 1947 (Petitioner's Exhibit Nos. 22-A and 22-B), the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 53 and 65; all of said 1,293 and 3,191 barrels of spirits purchased under said production contracts were inspected and accepted by a representative of petitioner at Hedgeside as produced, said spirits were placed in barrels furnished by petitioner for that purpose, said barrels of spirits were then immediately stored in bond in Hedgeside's Internal Revenue Bonded Warehouse No. 2, Napa, California, and warehouse receipts covering said spirits were issued by Hedgeside to petitioner which warehouse receipts are still held by petitioner, excepting that the spirits covered by warehouse receipt numbers 3665-B, 3669-B, and 3670-B were originally stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan Farm and Livestock Corp., a corporation, located at Yountville, California, and thereafter transferred in bond to Hedgeside Internal Revenue Bonded Warehouse No. 2, as set out in Petitioner's Exhibit No. 45;

Also pursuant to said contract of October 13, 1947 (Petitioner's Exhibit Nos. 22-A and 22-B) in November, 1947, petitioner purchased from Hedgeside 331 barrels of "on Hand" spirits [part of which was in fact whiskey but which has been treated by the parties throughout as grain spirits], the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 50 and 65; of the warehouse receipts now held by petitioner

covering said 331 barrels, warehouse receipts Nos. 3511-B and 3512-B were issued by Hedgeside to Petitioner at the time of said sale and the spirits covered thereby were then stored in bond in Hedgeside Internal Revenue Bonded Warehouse No. 2, whereas the spirits now covered by warehouse receipts Nos. 3671-B and 3673-B were at the time of said sale stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan Farm and Livestock Corp., and thereafter transferred in bond to Hedgeside Internal Revenue Bonded Warehouse No. 2, as set out in Petitioner's Exhibit No. 45; a true and correct summary of the evidence of said purchases of the above 4,815 barrels of said spirits by Petitioner from Hedgeside is set out in Exhibit "B" hereto which is incorporated herein and made a part hereof for all purposes.

(b) Petitioner purchased a total of 1,359 barrels of said grain spirits from Franciscan Farm and Livestock Corp., a California corporation;

In March and April, 1947, pursuant to a production contract for grain spirits between one R. I. Stone, d.b.a. Franciscan Farm and Livestock Corp., and petitioner, dated November 1, 1945, assigned by Stone to Franciscan Farm and Livestock Corp., a California corporation (Petitioner's Exhibits Nos. 23 and 25-B), petitioner purchased 459 barrels of said spirits from Franciscan Farm and Livestock Corp., the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit No. 49; concurrently with the production and sale of

said 459 barrels of spirits said spirits were inspected and accepted by a representative of petitioner at Franciscan as produced, said spirits were placed in barrels furnished by petitioner for that purpose, and said barrels of spirits were then stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside and warehouse receipts issued by Hedgeside to petitioner covering said barrels which warehouse receipts are still held by petitioner;

Between December, 1947 and April, 1948, pursuant to a production contract for grain spirits between Franciscan Farm and Livestock Corp. and petitioner dated October 13, 1947 (Petitioner's Exhibit Nos. 25-A and 25-B), petitioner purchased 900 barrels of said spirits from Franciscan Farm and Livestock Corp., the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 51, 64 and 50; concurrently with the purchase and sale of said 900 barrels of spirits, said spirits were inspected and accepted by a representative of petitioner at Franciscan as produced, said spirits were placed in barrels furnished by petitioner for that purpose, and said barrels of spirits were then stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan and covered by warehouse receipts issued by Franciscan to petitioner, and in November and December, 1948, said barrels were transferred in bond to Internal Revenue Bonded Warehouse No. 2 of Hedgeside, as set out in Petitioner's Exhibit Nos. 45 and 51, at which time the warehouse receipts for

said barrels now held by petitioner were issued to petitioner by Hedgeside; a true and correct summary of the evidence of said purchases of the above 1,359 barrels of said spirits from Franciscan is set out in Exhibit "C" hereto which is incorporated herein and made a part hereof for all purposes;

(c) The balance of said 8,933 barrels of whiskey and grain spirits, totalling 2,759 barrels of whiskey, was purchased by petitioner from Heaven Hill Corporation, a California corporation, by an oral contract made between the parties in December, 1947, and performed by the parties in January, 1948, and petitioner is now the holder of warehouse receipts Nos. 3681B, 3682B, 3683B, and 3684B issued by Hedgeside to petitioner covering said whiskey now stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside; said 2,759 barrels of whiskey was originally produced by Franciscan Farm and Livestock Corp. at its distillery at Yountville, California, and continuously stored in bond since production in Internal Revenue Bonded Warehouse No. 2 of Hedgeside, subject to warehouse receipts issued from time to time to the respective owners by Hedgeside as follows:

Concurrently with its production between October, 1946 and January, 1947, 2,861 barrels of whiskey (of which said 2,759 barrels of whiskey is a part) was sold by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, a California corporation, and a wholly-owned subsidiary of Glaser Bros., a California corporation,

pursuant to an oral agreement between the parties; said whiskey was stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside as produced, and its sale to Barnhill Distilleries Company completed within a few days of production by delivery of Hedgeside warehouse receipts to Barnhill Distilleries Company in exchange for the agreed purchase price of \$162,316.50 which was paid to Franciscan by Glaser Bros., the documentary evidence of said purchase and sale being contained in petitioner's Exhibit No. 7 (invoices, checks and drafts), Petitioner's Exhibit Nos. 2, 3, 4 and 5 (Cancelled warehouse receipts originally issued to Barnhill contained in Hedgeside Warehouse Receipt Book), and Anglo Bank's Exhibit No. 34 [Franciscan Journal]; the parties to said purchase and sale intended to and did effect a transfer of title to said whiskey at the time said warehouse receipts were delivered to Barnhill Distilleries Company; the original purchase price was subsequently reduced to the sum of \$130,951.44 by means of a credit memorandum issued by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, as the result of the compromise of a dispute over the transaction which later arose between the parties;

Barnhill Distilleries Company held all of said warehouse receipts covering said 2,861 barrels of whiskey from January, 1947, the date of issue of the last of said receipts, until January 3, 1948, except for two barrels which were disposed of by

Barnhill during the period; on January 3, 1948, Barnhill exchanged said receipts covering 2,759 barrels of said whiskey for four negotiable warehouse receipts of Hedgeside, Warehouse Receipt Nos. 384, 385, 386 and 387 (Petitioner's Exhibit No. 1), and in accordance with an oral agreement of sale with Heaven Hill Corporation delivered said four negotiable warehouse receipts covering said 2,859 barrels of said whiskey to Heaven Hill Corporation in exchange for the purchase price of \$131,983.70 (Petitioner's Exhibit Nos. 8 and 9);

Pursuant to said oral agreement of sale between Heaven Hill Corporation and Petitioner, Heaven Hill Corporation immediately delivered said four negotiable warehouse receipts covering said 2,859 barrels of whiskey to Petitioner in exchange for the purchase price for said whiskey to Petitioner of \$150,314.77 (Petitioner's Exhibit Nos. 11A, 11B and 11C);

Petitioner held said four negotiable warehouse receipts covering said 2,859 barrels of whiskey from January to December, 1948, except that during this period 100 barrels of said whiskey covered by warehouse receipt No. 384 were withdrawn by Petitioner; on December 22, 1948, Petitioner exchanged said four negotiable warehouse receipts, covering 2,759 barrels of said whiskey, for non-negotiable warehouse receipts of Hedgeside, Nos. 3681B, 3682B, 3683B and 3684B (Petitioner's Exhibit No. 26), which warehouse receipts are now and ever since said date have been held by Petitioner;

A true and correct summary of the evidence of

said transactions covering said 2,759 barrels of whiskey is set out in Exhibit "D" hereto which is incorporated herein and made a part hereof for all purposes;

5. Anglo Bank is the holder of duplicate warehouse receipts covering 3,333 barrels of said 8,933 barrels of whiskey and spirits, said duplicate receipts having been pledged by Hedgeside to secure loans made by Anglo Bank to Hedgeside, as follows:

(a) On January 4, 1949, Hedgeside pledged to Anglo Bank as security for a loan its warehouse receipt No. 3689B purporting to cover 574 barrels of the 3,191 barrels of grain spirits described in paragraph 4-A of the above findings of fact, which spirits had been purchased by Petitioner from Hedgeside between October, 1947 and March, 1948; at the time of said pledge to Anglo Bank, Petitioner was the holder of valid Hedgeside warehouse receipts for the same 574 barrels of grain spirits, as follows:

No. of Barrels and Serial Numbers	No. and Date of Issue of Petitioner's Warehouse Receipts	No. and Date of Issue of Anglo Bank's Warehouse Receipts
69 70228-296	3525B (11-24-47)	3689B (1-5-49)
27 70942-968	3538B (Undated)	
50 70969-71018	3539B (12-8-47)	
74 71069-71142	3541B (12-10-47)	
96 71143-71238	3543B (12-11-47)	
85 71239-71323	3544B (12-12-47)	
150 71324-71473	3545B (12-15-47)	
23 71474-71496	3545B (12-15-47)	

574 Barrels

All of the above warehouse receipts now held by Petitioner for said 574 barrels of spirits were issued by Hedgeside and delivered by it to Petitioner pursuant to said production contract described in 4 (a) hereof more than one year prior to the issue and pledge by Hedgeside of receipt No. 3689-B to Anglo Bank [Receipt No. 3538B, undated, was delivered to Petitioner on or about December 9, 1947]; said warehouse receipts of Petitioner for said 574 barrels were delivered to Petitioner through Anglo Bank, the bank acting as collection agent for Hedgeside and delivering said warehouse receipts to Petitioner in exchange for payment of Hedgeside drafts, and Anglo Bank had actual knowledge of said delivery to Petitioner of said warehouse receipts covering said 574 barrels to Petitioner;

Petitioner at all times since delivery to it of said warehouse receipts retained and held all the indicia of ownership of said 574 barrels and Hedgeside was at no time clothed with the apparent ownership of said property but held only the naked possession thereof in its capacity as a bonded warehouseman; said warehouse receipt No. 3689-B was issued and pledged by Hedgeside to Anglo Bank without Petitioner's knowledge, authority, or consent, and Anglo Bank in accepting said warehouse receipt relied solely on the mere possession of said property by Hedgeside as the proprietor of a government bonded warehouse; in accepting said warehouse receipt Anglo Bank was not misled by any

act or omission on the part of Petitioner or of anyone acting on behalf of Petitioner;

(b) Between June 17, 1947 and September 16, 1948, Hedgeside pledged to Anglo Bank as security for loans to Hedgeside its warehouse receipts purporting to cover said 2,859 barrels of whiskey, described in paragraph 4 (c) hereof, which whiskey had been produced by Franciscan Farm and Livestock Corp. and sold by it to Barnhill Distilleries Company as produced; the numbers and dates of issues of said warehouse receipts pledged by Hedgeside to Anglo Bank are as follows:

No.	Date of Issue	No. of Barrels
3469-B	6-17-47	225
3470-B	6-17-47	735
3472-B	7-30-47	100
3474-B	9-10-47	100
3475-B	9-16-47	200
3476-B	9-16-47	200
3477-B	10-22-47	200
3548-B	12-17-47	200
3552-B	9-16-48	899
		<hr/> 2,859

As set out in said paragraph 4 (c) hereof and as summarized by Exhibit "D" hereto, at the time of said purported pledges to Anglo Bank, Petitioner or Petitioner's predecessors in title were the holders of valid warehouse receipts covering said 2,859 barrels of whiskey, then stored in Hedgeside's Internal Revenue Bonded Warehouse No. 2, the last warehouse receipt for said whiskey having been issued to Barnhill Distilleries Company more

than four months before the first warehouse receipt for said whiskey was pledged to Anglo Bank;

Petitioner, or petitioner's predecessors in title, Heaven Hill Corporation and Barnhill Distilleries Company, at all times since delivery to them of their warehouse receipts covering said whiskey, retained and held all the indicia of ownership of said whiskey and Hedgeside was at no time clothed with the apparent ownership of said property but held only the naked possession thereof in its capacity as a bonded warehouseman; the warehouse receipts listed above held by Anglo Bank were issued and pledged by Hedgeside to Anglo Bank without the knowledge, authority or consent of Franciscan Farm and Livestock Corp., the original producer and owner of said whiskey, and without the knowledge, authority or consent of said subsequent purchasers of said whiskey and holders of valid warehouse receipts therefor, Barnhill Distilleries Company, Heaven Hill Corporation, and Petitioner, and Anglo Bank in accepting its said warehouse receipts from Hedgeside relied solely on the mere possession of said whiskey by Hedgeside as proprietor of a government bonded warehouse; in accepting its said warehouse receipts Anglo Bank was not misled or deceived by and did not suffer detriment because of any act or omission on the part of Petitioner or of Petitioner's predecessors in title Barnhill Distilleries Company, Heaven Hill Corporation, and Franciscan Farm and Livestock Corp.

6. At all times herein mentioned up to the date

of filing of said involuntary petition in bankruptcy, Hedgeside's Internal Revenue Bonded Warehouse No. 2 held a permit to operate said warehouse duly issued by the United States, Alcohol Tax Unit Form 27-D (Petitioner's Exhibit Nos. 46 and 47), and at all of said times held a "Distilled Spirits Manufacturer's License" and a "Public Warehouse" license duly issued by the Board of Equalization of the State of California; at all of said times Hedgeside did not advertise for or solicit customers for the storing of spirits and whiskey and did not regularly store goods for the public generally, but in the regular course of its business Hedgeside stored in bond whiskey and spirits produced in its own distillery and whiskey and spirits owned by a limited number of persons licensed to deal in bulk whiskey and spirits and with whom Hedgeside did business, charging a reasonable rate in the regular course of business for such storage.

7. The principal place of business of Hedgeside and its Internal Revenue Bonded Warehouse No. 2 at all times herein mentioned was located at Napa, California, and at all of said times copies of warehouse receipts issued by Hedgeside covering whiskey and spirits stored in bond in its Internal Revenue Bonded Warehouse No. 2 were kept at said principal place of business and at said warehouse.

8. At all times herein mentioned during the year 1948 Anglo Bank was not a creditor of Franciscan Farm and Livestock Corp., a corporation.

From the foregoing Findings of Fact the Court makes its

CONCLUSIONS OF LAW

1. At all times hereinabove mentioned and in each of said transactions wherein Petitioner purchased said whiskey and spirits, Petitioner was and is a bona fide purchaser of said whiskey and spirits totalling 8,933 barrels.

2. At the time of said pledge by Hedgeside to Anglo Bank of duplicate warehouse receipts for said 574 barrels of spirits hereinabove described, Hedgeside was not the owner of said spirits nor did it have any right, title or interest in or to said spirits except as bailee for Petitioner, who was at said time the owner of said spirits and the holder of valid warehouse receipts for the same; Anglo Bank has no right, title or interest whatsoever in or to said 574 barrels of spirits by virtue of said pledge or said duplicate warehouse receipts, or otherwise.

3. Hedgeside was at no time the owner of said 2,759 barrels of whiskey hereinabove described, nor did Hedgeside have any right, title or interest to said whiskey except as bailee for the true owners thereof, and said pledge by Hedgeside to Anglo Bank of duplicate warehouse receipts for said whiskey carried no title to or interest in said whiskey to Anglo Bank; prior to said pledge of said duplicate warehouse receipts said whiskey consisting of said 2,859 barrels had been sold by Franciscan Farm and Livestock Corp., the producer and original owner of said whiskey, to Barnhill Distilleries

Company, which thereby became the owner of said whiskey and which passed good title thereto to Heaven Hill Corporation, Petitioner's predecessor in title; Anglo Bank has no right, title or interest whatsoever in or to said whiskey, or any part thereof, by virtue of said pledge or duplicate warehouse receipts, or otherwise, and Anglo Bank has no right, title or interest in or to the balance of said 8,933 barrels of whiskey and spirits, or any part thereof.

4. At all times hereinabove mentioned when whiskey and spirits produced by Franciscan Farm and Livestock Corp. were transferred into storage in Hedgeside's said warehouse concurrently with the sale of said whiskey and spirits, there was an immediate delivery and an actual and continued change of possession of said goods within the meaning of Section 3440 of the Code of Civil Procedure of the State of California.

5. At all times hereinabove mentioned prior to the filing of said involuntary petition in bankruptcy, Hedgeside was a warehouseman as defined in the California Uniform Warehouse Receipts Act, and at all of said times was lawfully engaged in the business of storing goods for profit, and was authorized to and did issue valid warehouse receipts for goods so stored, including said warehouse receipts now held by petitioner for said 8,933 barrels of whiskey and spirits; at all said times Hedgeside

was not a public utility under the Public Utilities Act of California.

6. At all times hereinabove mentioned when Hedgeside issued its warehouse receipts as bailee for said 8,933 barrels of whiskey and spirits stored in its Internal Revenue Bonded Warehouse No. 2, the California Uniform Warehouse Receipts Act was the exclusive statute governing and controlling the transfer of title to said whiskey and spirits and the ownership thereof, for all purposes, and the provisions of Section 3440 of the Code of Civil Procedure of the State of California had and has no application whatsoever to said whiskey and spirits so stored under said warehouse receipts.

7. At all times hereinabove mentioned Hedgeside was the lawful proprietor of a United States Government bonded warehouse pursuant to and authorized by the laws and regulations of the United States, namely, Internal Revenue Bonded Warehouse No. 2; at all times hereinabove mentioned when portions of said 8,933 barrels of whiskey and spirits were stored in the bonded warehouse of Franciscan Farm and Livestock Corp., said corporation was the lawful proprietor of a United States Government bonded warehouse pursuant to and authorized by the laws of the United States, namely, Internal Revenue Bonded Warehouse No. 111; at all of said times the transfer of all or part of said 8,933 barrels of whiskey into bond in said warehouses subjected said whiskey and spirits to

the statutes contained in the Internal Revenue Code of the United States, and to the regulations promulgated thereunder, and said transfers into bond concurrently with the sale of said whiskey and spirits were accompanied by an immediate delivery and an actual and continued change of possession within the meaning of Section 3440 of the Code of Civil Procedure of the State of California.

8. At all times hereinabove mentioned when Hedgeside issued its warehouse receipts to petitioner for all or part of said 8,933 barrels of whiskey and spirits, Hedgeside recognized the conveyance to Petitioner of said goods and confirmed said conveyance by the making of the storage contract contained in said warehouse receipts, and Hedgeside as bailee for Petitioner was and is estopped from disputing Petitioner's title to said goods as against Hedgeside.

9. Said bankrupt, Hedgeside and its estate, and said trustee in bankruptcy, have no right, title or interest whatsoever in or to said 8,933 barrels of whiskey and spirits, or any part thereof, either legal or equitable; Petitioner is the exclusive owner of said 8,933 barrels of whiskey and spirits and is entitled to the immediate possession thereof.

Wherefore, It Is Ordered that Petitioner's said reclamation petition be and the same is hereby granted, and the said trustee is ordered and directed

to forthwith surrender and deliver said 8,933 barrels of whiskey and spirits to Petitioner.

Dated: January 10th, 1952.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy

[Exhibit A is not reproduced here as it is identical to Exhibit A set out at pages 6-9 of this printed record.]

[Endorsed]: Filed Jan. 10, 1952.

**SUMMARY OF SCHEMELT DISTILLERS CORPORATION PURCHASES OF SPIRITS GRAIN PRODUCED BY
EDGEWIDE DISTILLERY CORPORATION AND NOW CARRIED IN STORAGE IN I. B. N. #2 AT WAPA, CALIFORNIA**

Warehouse Receipts			Invoices (Issued by Edgewide Distillery Corporation)			Payments by Schemelt Distillers Corporation				
Number	Date	Quantity (in barrels)	Serial Numbers	Number	Date	Quantity (in barrels)	Serial Numbers	Check No.	Date	Drawn to
33648	2/24/47	105 S.O.	62257 - 62361	882	2/24/47	150 S.O.	62212 - 62361	2/47 \$5,806.54		
33651	2/25/47	38	62462 - 62499	884	2/25/47	38	62462 - 62499	2/47 1,217.03	3-00937	3/4/47 Bankers Trust Co, re - Edgewide Distillery Corporation
33663	2/25/47	100	62562 - 62461	883	2/25/47	100	62562 - 62461	2/47 3,200.23		
33668	3/21/47	44	64201 - 64244	909	3/21/47	51	64194 - 64244	3/47 1,681.39		
33691	3/24/47	94	64245 - 64338	910	3/24/47	94	64245 - 64338	3/47 3,013.84		
33693	3/25/47	38	64339 - 64376	915	3/25/47	38	64339 - 64376	3/47 1,227.52	3-90755	4/1/47
33698	3/25/47	56	64377 - 64434	916	3/25/47	56	64377 - 64434	3/47 1,887.67		
33706	3/25/47	59	64435 - 64493	917	3/25/47	59	64435 - 64493	3/47 1,913.11		
33778	3/26/47	96	64494 - 64569	918	3/26/47	96	64494 - 64569	3/47 3,108.33	3-90890	4/1/47
34018	3/27/47	90	64570 - 64579	919	3/27/47	90	64570 - 64579	3/47 2,872.83	4-90934	4/2/47
34058	3/31/47	92	64680 - 64771	921	3/31/47	92	64680 - 64771	3/47 2,972.79		
34068	4/2/47	100	64772 - 64871	925	4/2/47	100	64772 - 64871	3/47 3,243.92	4-91345	4/8/47
34098	4/2/47	49	64872 - 64919	926	4/2/47	48	64872 - 64919	3/47 1,597.99		
34098	4/2/47	50	64920 - 64969	927	4/2/47	50	64920 - 64969	3/47 1,620.91		
34108	4/2/47	44	64970 - 65013	928	4/2/47	44	64970 - 65013	3/47 1,427.37		
34128	4/2/47	90	65014 - 65103	929	4/2/47	90	65014 - 65103	3/47 2,969.89	4-91467	4/9/47
34188	4/7/47	10	65104 - 65113	931	4/7/47	10	65104 - 65113	3/47 326.08	4-91700	4/11/47
34208	4/9/47	10	65114 - 65141	933	4/9/47	10	65114 - 65141	3/47 1,690.26	4-91837	4/13/47
34358	4/17/47	27	65921 - 65908	956	5/6/47	80	65909 - 65988	3/47 2,794.60	5-92861	5/20/47
Total		1,293 S.O.								

Spirits Produced and Purchased under the Terms of a Contract dated October 13, 1947						
Number	Date	Quantity (in barrels)	Serial Numbers	Inspection	Date	Amount
68747	10/27/47	50 S.O.	68747 - 68796	10/47	1,780.50	
68797	10/27/47	20	68797 - 68816	10/47	712.08	
68817	10/28/47	16	68817 - 68832	10/47	576.26	
68833	10/28/47	50	68833 - 68882	10/47	1,789.03	
68883	10/29/47	35	68883 - 68917	10/47	1,250.88	S.P. 11-34
68956	11/17/47	119	68956 - 68911	11/47	4,215.77	S.P. 11-690
68985	11/19/47	81	68985 - 70065	11/47	2,864.25	S.P. 11-733
70066	11/20/47	70	70066 - 70135	11/47	2,475.55	S.P. 11-818
70228	11/24/47	69	70228 - 70286	11/47	2,436.99	S.P. 11-893
70350	11/28/47	137	70350 - 70486	11/47	4,890.76	S.P. 12-22
70487	11/28/47	69	70487 - 70555	12/47	2,427.64	S.P. 12-18
70542	12/5/47	63	70542 - 70568	12/47	2,293.12	S.P. 12-195
70569	12/10/47	50	70569 - 71018	12/47	1,774.32	S.P. 12-284
71069	12/10/47	74	71069 - 71182	12/47	2,610.78	S.P. 12-383
71183	12/11/47	96	71183 - 71238	12/47	3,536.68	S.P. 12-496
71239	12/12/47	85	71239 - 71323	12/47	3,014.20	S.P. 12-495

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(Invoices Issued by Hedgeside Distillery Corporation)

Warehouse Receipts

Number	Date	Quantity (in barrels)	Serial Numbers
3511B	11/20/47	45 kb.	349-002
3512B	11/20/47	40 "	3777 - 3816
3513B	11/20/47	40 "	3906 - 3954
3671B	12/6/48	25 S.O.	5735 - 5819
3672B	12/7/48	15 "	5837 - 5851
3673B	12/7/48	2 "	5852 - 5853
3673B	12/7/48	17 "	5888 - 5904
3673B	12/7/48	18 "	5940 - 5957
3673B	12/7/48	60 "	5976 - 6635

Total 331

Invoices (Issued by Hedgeside Distillery Corporation)

Number	Date	Quantity (in barrels)	Serial Numbers	Inspection Date	Amount
1075	11/20/47	45 kb.	049 - 202	11/46	1,711.38
1076	11/20/47	40 "	3777 - 3816	2/47	3,566.64
1076	11/20/47	40 "	3906 - 3954	2/47	3,408.97
1077	11/20/47	25 S.O.	5735 - 5819	4/47	3,408.97
1078	11/20/47	15 "	5837 - 5851	5/47	4,481.26
1078	11/20/47	2 "	5852 - 5853	5/47	
1078	11/20/47	17 "	5888 - 5904	5/47	
1078	11/20/47	18 "	5940 - 5957	5/47	
1078	11/20/47	60 "	5976 - 6635	5/47	

Payments by Schenley Distillers Corporation

Voucher No.	Check No.	Date	Drawn to
S.F. 11-816	07459	11/25/47	Anglo California Bank Re -
S.F. 11-884	07599	11/28/47	Hedgeside Distillery Corporation "
S.F. 11-817	07460	11/25/47	"
S.F. 11-822	07465	11/25/47	"

SUMMARY OF SCHEIDT DISTILLERS CORPORATION PURCHASES OF SPIRITS GRAIN AND MISCELL PRODUCED AT FRANCISCAN FARM AND LIVESTOCK COMPANY AND NOW CARRIED IN STORAGE IN L. I. S. V. #2 AT M. A. P. S., CALIFORNIA

Payments by Scheidt Distillers Corporation

Warehouse Receipts		Invoices		Inspection		Voucher		Check		Drawn to	
Number	Date (in barrels)	Quantity	Serial Numbers	Number	Date	Serial Numbers	Amount	No.	No.	Date	Drawn to
3671B	3/16/47	42 S.O.	4351 - 4392	140	3/19/47	4351 - 4392	\$1,355.83	N.Y. 3-90391	3-90391	3/24/47	National City Bank, N.Y. Re - Franciscan Farm & Livestock Co.
3671B	3/19/47	38	4393 - 4472	141	3/19/47	4393 - 4472	1,226.56	N.Y. 3-90743	3-90743	3/31/47	"
3671B	3/21/47	42	4431 - 4508	142	3/21/47	4431 - 4508	1,364.62	N.Y. 3-90743	3-90743	3/31/47	"
3671B	3/21/47	36	4473 - 4508	143	3/21/47	4473 - 4508	1,170.92	N.Y. 3-90899	3-90899	4/1/47	"
3671B	3/24/47	46	4509 - 4580	145	3/24/47	4509 - 4580	1,486.24	N.Y. 3-90899	3-90899	4/1/47	"
3671B	3/24/47	26	4555 - 4580	146	3/25/47	4555 - 4580	1,844.14	N.Y. 4-91000	4-91000	4/2/47	"
3671B	3/26/47	46	4581 - 4626	147	3/26/47	4581 - 4626	1,487.16	N.Y. 4-91000	4-91000	4/2/47	"
3671B	3/27/47	27	4627 - 4653	148	3/27/47	4627 - 4653	876.02	"	"	"	"
3671B	3/27/47	25	4654 - 4678	149	3/27/47	4654 - 4678	810.17	"	"	"	"
3671B	3/28/47	31	4679 - 4709	150	3/28/47	4679 - 4709	1,001.15	N.Y. 4-91283	4-91283	4/7/47	"
3671B	3/28/47	31	4710 - 4740	151	3/28/47	4710 - 4740	1,066.16	N.Y. 4-91283	4-91283	4/7/47	"
3671B	3/31/47	37	4741 - 4777	152	3/31/47	4741 - 4777	1,192.71	N.Y. 4-91344	4-91344	4/8/47	Managers Trust Co., N.Y. Re - Franciscan Farm & Livestock Co.
3671B	4/1/47	32	4778 - 4809	154	4/1/47	4778 - 4809	1,032.57	N.Y. 4-91344	4-91344	4/8/47	"

Total 459

Spirits Produced and Purchased under the terms of a Contract dated October 13, 1947 (Invoices Issued by Franciscan Farm and Livestock Company)

Number	Date	Quantity	Serial Numbers	Number	Date	Serial Numbers	Amount	No.	No.	Date	Drawn to
3671B	12/7/48	3 S.O.	6239 - 6241	197	11/10/47	6239 - 6241	\$ 1,530.24	S.F. 11-879	07555	11/28/47	Anglo California Bank Re - Franciscan Farm & Livestock Co.
3671B	12/8/48	68	6242 - 6309	198	11/10/47	6242 - 6281	1,004.14	S.F. 11-878	07554	11/28/47	"
3671B	12/8/48	19	6311 - 6369	199	11/10/47	6282 - 6309	676.06	S.F. 11-880	07154	11/28/47	"
3671B	12/8/48	23	6445 - 6472	192	11/13/47	6311 - 6369	1,464.19	S.F. 11-732	07364	11/24/47	"
3671B	12/9/48	44	6492 - 6538	194	11/18/47	6432 - 6444	1,572.29	S.F. 11-819	07462	11/25/47	"
3671B	12/10/48	26	6560 - 6587	196	11/20/47	6445 - 6472	1,716.09	S.F. 11-866	07557	11/28/47	"
3671B	12/10/48	20	6588 - 6607	196	11/24/47	6492 - 6538	1,330.36	S.F. 12-674	08516	12/13/47	"
3671B	12/10/48	32	6560 - 6597	220	12/15/47	6588 - 6607	854.57	S.F. 12-671	08913	12/19/47	"
3671B	12/17/48	48	7031 - 7078	221	12/15/47	6607 - 6997	1,467.13	S.F. 12-790	08598	12/22/47	"
3671B	12/17/48	73	7079 - 7151	224	12/16/47	7031 - 7071	1,143.20	S.F. 12-829	08645	12/23/47	"
3671B	12/17/48	20 S.O.	7169 - 7188	225	12/16/47	7072 - 7078	1,725.20	S.F. 12-901	08711	12/23/47	"
3671B	12/17/48	4	7382 - 7385	226	12/19/47	7079 - 7103	712.61	S.F. 12-1089	08896	1/2/48	"
3671B	12/17/48	3	7388 - 7390	229	12/20/47	7104 - 7151	161.13	S.F. 2-733	10932	2/19/48	"
3671B	"	100	7391 - 7490	253	2/21/48	7189 - 7188	154.43	S.F. 2-913	11105	2/25/48	"
3671B	"			253	2/21/48	7382 - 7390					

WARRANTY (PURCHASED AT SHERIDAN DISTILLERS CO. FROM W. W. HILL, JR.)
 ALL WHISKEY DISTILLED BY SHERIDAN DISTILLERS CO. FROM W. W. HILL, JR. IS
 GUARANTEED TO BE PURE MALT WHISKEY OF HIGHEST QUALITY. NO OTHER
 WHISKEY IS TO BE MIXED WITH IT. ALL MERCHANDISE STORED IN
 SHERIDAN DISTILLERS CO. WAREHOUSE, 1032 AND 1034 CALIFORNIA BANK, AT
 HEDGECOCK DISTRICT, CALIFORNIA.

History of Title to 254 Barrels of Whiskey from Dates of Production by Franciscan Farm and Livestock Co. to the ownership by
 Schedule Distillers Corp. as evidenced by invoices from the producer and by Warehouse Receipts covering all
 transactions from the date of initial storage in I.R.S.M. No. 2 to the present date

Non-Negotiable Warehouse Receipts issued to Schedule Distillers Corp. by Franciscan Farm & Livestock Co. to cover sale of merchandise

Non-Negotiable Warehouse Receipts issued to Schedule Distillers Corp. by Franciscan Farm & Livestock Co. to cover sale of merchandise

Non-Negotiable Warehouse Receipts issued to Schedule Distillers Corp. by Franciscan Farm & Livestock Co. to cover sale of merchandise

Serial Number	Production quantity	Production Date	Invol. No.	Invoice Date	Invoice	Date of Payment	Number	Date	Number	Date
34	28	10/23/46	44	10/23/46	10/23/46					
35	25	10/24/46	"	"	"		3126B	10/23/46		
36	35	10/25/46	"	"	"					
37	7	10/25/46	"	"	"					
38	7	10/25/46	"	"	"					
39	35	10/25/46	45	10/25/46	10/30/46		3126B	10/23/46		
40	44	10/25/46	46	10/31/46	10/31/46					
41	32	10/30/46	47	10/31/46	10/31/46					
42	47	10/31/46	48	11/1/46	11/1/46					
43	32	11/1/46	49	11/1/46	11/5/46					
44	566-563	11/1/46	"	"	"					
45	564-561	11/1/46	"	"	"					
46	562-559	11/1/46	"	"	"					
47	560-557	11/1/46	"	"	"					
48	558-555	11/1/46	"	"	"					
49	556-553	11/1/46	"	"	"					
50	554-551	11/1/46	50	11/2/46	11/2/46		3211B	11/5/46		
51	552-549	11/1/46	51	11/2/46	11/7/46		3212B	11/2/46		
52	550-547	11/1/46	52	11/2/46	11/7/46		3213B	11/2/46		
53	548-545	11/1/46	53	11/2/46	11/12/46		3214B	11/2/46		
54	546-543	11/1/46	54	11/2/46	11/15/46		3215B	11/2/46		
55	544-541	11/1/46	55	11/2/46	11/15/46		3216B	11/2/46		
56	542-539	11/1/46	56	11/12/46	11/19/46		3218B	11/13/46		
57	540-537	11/1/46	57	11/14/46	11/18/46		3222B	11/14/46		
58	538-535	11/1/46	58	11/15/46	11/19/46		3224B	11/15/46		
59	1	11/18/46	59	11/13/46	11/21/46		3226B	11/13/46		

Spirits Grain

993 1 11/18/46

Whiskey

994-1034 41 11/18/46

1035-1076 42 11/19/46

1077-1116 40 11/20/46

1117-1160 44 11/21/46

1161-1200 40 11/22/46

1201-1244 44 11/25/46

1245-1275 31 11/26/46

1276-1303 28 11/27/46

Warehouse Receipts issued by Hedgcock Distillery Corp. to the Anglo California Bank as collateral for loans to Hedgcock side.

Non-Negotiable Warehouse Receipts issued to Schedule Distillers Corp. when Negotiable Receipts were cancelled. (Negotiable Receipts were cancelled on December 22, 1943)

Non-Negotiable Warehouse Receipts issued to Schedule Distillers Corp. when Negotiable Receipts were cancelled. (Negotiable Receipts were cancelled on December 22, 1943)

Non-Negotiable Warehouse Receipts issued to Schedule Distillers Corp. when Negotiable Receipts were cancelled. (Negotiable Receipts were cancelled on December 22, 1943)

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Non-Negotiable Warehouse Receipts issued to Schedule Distillers Corp. when Negotiable Receipts were cancelled. (Negotiable Receipts were cancelled on December 22, 1943)

See Note (1) 3462B (225 Barrels) 6/17/47

3681B (125 Barrels) 12/22/43

3682B (735 Barrels) 12/22/43

385 (735 Barrels) 1/3/48

385 (See above) 1/3/48

3652B (See above) 12/22/48

3470B (735 Barrels) 6/17/47

(See Note (2))

(See Note (2))

(See Note (2))

Inventory of Title to 2659 Barrels of Whisky from dates of production by Franciscan Farm and Livestock Co. to the extent, by Scheele Distillers Corp. as evidenced by invoices from the producer and/or shippers' drafts covering all transactions from the date of initial storage in I. S. W. Co. to the present date.

Serial Numbers	Production Quantity	Production Date	Invoice		Date	Number	Date	Number	Date
			No.	Date of Payment					
1304-1340	37	12/6/46	72	12/6/46	12/6/46	2842B	12/6/46	3476A	7/3/47
1341-1378	39	12/7/46	73	12/7/46	12/9/46	3243B	12/9/46	(100 Barrels)	
1379-1403	25	12/9/46	74	12/9/46	12/12/46	3245B	12/12/46	(100 Barrels)	
1404-1417	14	12/9/46							
1418-1457	39	12/11/46	75	12/11/46	12/11/46	3250B	12/11/46	3476A	7/10/47
1458-1477	41	12/11/46	76	12/11/46	12/11/46	3251B	12/11/46	(100 Barrels)	
1478-1503	6	12/12/46	77	12/13/46	12/16/46	3254B	12/13/46		
1504-1535	32	12/13/46							
1536-1578	43	12/14/46	78	12/13/46	12/16/46	3255B	12/13/46		
1579-1616	38	12/14/46	79	12/16/46	12/19/46	3258B	12/16/46		
1617-1660	44	12/16/46	80	12/16/46	12/19/46	3259B	12/16/46		
1661-1677	37	12/17/46	81	12/18/46	12/20/46	3261B	12/18/46		
1678-1703	6	12/18/46	82	12/18/46	12/20/46	3263B	12/18/46		
1704-1743	40	12/19/46							
1744-1783	40	12/19/46	83	12/20/46	12/23/46	3266B	12/20/46	3683B	12/22/46
1784-1824	41	12/20/46	84	12/20/46	12/28/46	3269B	12/20/46	(862 Barrels)	
1825-1867	39	12/21/46	85	12/23/46	12/28/46	3270B	12/23/46		
1868-1903	40	12/23/46	86	12/23/46	12/28/46	3272B	12/23/46		
1904-1905	6								
1910-1941	38	12/24/46	88	12/26/46	12/30/46	3275B	12/26/46		
1942-1977	50	12/26/46	89	12/27/46	12/30/46	3276B	12/27/46		
1978-2036	33	12/27/46	90	12/27/46	1/6/47	3285B	12/27/46		
2037-2050	4	12/28/46	94	12/30/46	12/31/46	3286B	12/30/46		
2051-2103	13	12/30/46	91	12/30/46	12/31/46	3281B	12/30/46		
2104-2130	27	12/31/46							
2131-2157	27	12/31/46	93	12/31/46	1/6/47	3286B	12/31/46		
2158-2185	28	1/2/47	92	1/2/47	1/6/47	3287B	1/2/47		
2186-2215	30	1/2/47	96	1/3/47	1/6/47	3290B	1/3/47		
2216-2242	27	1/3/47	96	1/3/47	1/6/47	3291B	1/3/47		
2243-2269	27	1/3/47	97	1/3/47	1/7/47	3293B	1/3/47		
2270-2303	34	1/4/47	98	1/6/47	1/7/47	3294B	1/6/47		
2304-2306	3								
2307-2333	27	1/6/47	99	1/6/47	1/7/47	3295B	1/6/47		
2334-2351	18	1/6/47	101	1/7/47	1/20/47	3299B	1/7/47		
2352-2389	38	1/7/47	102	1/7/47	1/20/47	3300B	1/7/47		
2390-2444	55	1/8/47	103	1/8/47	1/20/47	3303B	1/8/47		
2445-2492	38	1/9/47	104	1/10/47	1/31/47	3304B	1/10/47		
2493-2509	27	1/10/47	105	1/10/47	1/31/47	3306B	1/10/47		

non-negotiable warehouse receipts issued to Franciscan Farm and Livestock Co. by Scheele Distillers Corp. when the whisky was placed in storage in I. S. W. Co. 200 Hedger side premises at Napa, California.

negotiable warehouse receipts issued to Barnhill Distilleries Co. by Hedger side Distillery Corp. when the whisky was placed in storage in I. S. W. Co. 200 Hedger side premises at Napa, California.

non-negotiable warehouse receipts issued to Scheele Distillery Corp. when the whisky was placed in storage in I. S. W. Co. 200 Hedger side premises at Napa, California.

negotiable warehouse receipts issued to Hedger side Distillery Corp. when the whisky was placed in storage in I. S. W. Co. 200 Hedger side premises at Napa, California.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Bernard J. Abrott, Referee in
Bankruptcy:

The petition of Charles W. Ebnother, Trustee in Bankruptcy of the above bankrupt, and The Anglo California National Bank of San Francisco, a national banking association, respectfully represents:

1. Your petitioners are aggrieved by the Order herein of the Honorable Bernard J. Abrott, Referee in Bankruptcy, dated January 10, 1952, a copy of which order is annexed hereto, marked "Exhibit A," and made a part hereof.

2. Said order specifies that the reclamation petitioner, Schenley Industries, Inc., is the owner and entitled to the immediate possession of 8,933 barrels of whiskey and grain spirits found in the possession of the bankrupt Hedgeside as of the date of bankruptcy. As to all of said property the reclamation petitioner holds documents purporting on their face to be "warehouse receipts." Undersigned petitioner, the Trustee in Bankruptcy, contends that the transfer of said property to said reclamation petitioner is invalid as to creditors of said bankrupt, whom the Trustee represents, since the said reclamation petitioner failed to take possession of said property as required by Section 3440 of the Civil Code of the State of California. Said Trustee further contends that said documents designated "warehouse receipts" are insufficient in law to avoid the effect of said Section 3440 since the issuer of

said receipts was not a "warehouseman" as defined by the Uniform Warehouse Receipts Act and the applicable California statutes and, therefore, not within the exception of Section 3440.5 of said Civil Code. Undersigned petitioner, The Anglo California National Bank of San Francisco, has set up a claim of title in itself as to a portion of said whiskey and spirits due to a pledge made to it by the bankrupt. There is no dispute as to the factual evidence in the record. There is, however, a dispute as to the correct legal conclusions to be adduced from said facts. In addition, said order contains certain findings of fact not supported by any evidence in the record and is objected to on said grounds. The specific objections and reasons therefor follow:

3. The Referee erred in said order as the fourth finding of fact therein (pp. 3-8 of said order) specifies that Schenley Industries, Inc. has held and now holds "warehouse receipts" for 8,933 barrels of whiskey and spirits now stored on the premises of the bankrupt. Said finding is wholly erroneous since although Schenley Industries, Inc. has held, and still holds, documents purported on their face to be "warehouse receipts", none of such documents now or at any time have been valid "warehouse receipts" since none of said documents were issued by a "warehouseman" as defined by the applicable laws of the State of California, a requirement in order to avoid Section 3440 of the Civil Code.

4. The Referee erred in respect to said order as the fourth finding of fact therein (at p. 7) specifies that:

“[T]he parties to said purchase and sale intended to and did effect a transfer of title to said whiskey at the time said warehouse receipts were delivered to Barnhill Distilleries Company; the original purchase price was subsequently reduced to the sum of \$130,951.44 by means of a credit memorandum issued by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, as the result of the compromise of a dispute over the transaction which later arose between the parties * * *”

The above quoted portions of said finding are clearly erroneous and not supported by any evidence appearing in the record. The uncontradicted evidence shows that the parties to the said purchase and sale intended to transfer title only upon an unconditional payment of the complete purchase price agreed upon but said price was never paid. Said finding is also clearly erroneous as the uncontradicted evidence shows that the credit memorandum referred to therein was issued as the result of a dispute arising between one Richard I. Stone, President of Franciscan Farm and Livestock Corp., and Barnhill Distilleries Company, a subsidiary of Glaser Bros., a California corporation, by reason of Stone's alleged violation of a contract between himself as an individual and said Glaser Bros., and had nothing whatsoever to do with the dispute between the parties to the transaction of sale referred to in said finding.

5. The Referee erred in said order as the fifth finding of fact therein (at p. 9) specifies that the

reclamation petitioner was the holder of "valid" warehouse receipts at the time of pledge of the property purportedly covered by said receipts to The Anglo California National Bank of San Francisco. Said finding is wholly erroneous as the uncontradicted evidence shows that the reclamation petitioner held no valid warehouse receipts since the issuer (Hedgeside) of said documents though entitled "warehouse receipts" was not a "warehouseman" as defined by the applicable laws of the State of California.

6. The Referee erred in said order as the fifth finding of fact therein (at p. 10) specifies that:

"* * * Anglo Bank in accepting said warehouse receipt relied solely on the mere possession of said property by Hedgeside as the proprietor of a government bonded warehouse; in accepting said warehouse receipt Anglo Bank was not misled by any act or omission on the part of Petitioner or of anyone acting on behalf of Petitioner."

Said finding of fact is clearly erroneous and not supported by evidence appearing in the record as the uncontradicted evidence shows that the said Anglo Bank did not rely solely on the mere possession of said property by Hedgeside but also relied on its knowledge that Hedgeside was in the business of distilling, producing and selling whiskey and distilled spirits and that in said connection it was customary to have the said products on its premises. Said finding is also erroneous as the uncontradicted evidence shows that the said Anglo Bank was mis-

led by the failure on the part of the reclamation petitioner to remove goods which it had purchased from the bankrupt from the premises of the bankrupt.

7. The Referee erred in said order as the fifth finding of fact therein (at bottom of p. 10) specifies that the reclamation petitioner and the reclamation petitioner's predecessors in interest were the holders of "valid" warehouse receipts covering some 2,859 barrels of whiskey. Said finding is wholly erroneous in that the bankrupt, the issuer of the receipts referred to, had no power to issue valid warehouse receipts since it was not a "warehouseman" as defined by the applicable laws of the State of California.

8. The Referee erred in said order as the fifth finding of fact therein (at p. 9) specifies that:

"[S]aid warehouse receipts of Petitioner for said 574 barrels were delivered to Petitioner through Anglo Bank, the bank acting as collection agent for Hedgeside and delivering said warehouse receipts to Petitioner in exchange for payment of Hedgeside drafts, and Anglo Bank had actual knowledge of said delivery to Petitioner of said warehouse receipts covering said 574 barrels to Petitioner."

Said finding is clearly erroneous as a bank, in functioning as a lending agent, is not charged with notice of matter coming to the attention of an employee in the collection department where there was no obligation or duty on said employee to transmit such notice to a proper officer or managing agent of the bank.

9. The Referee erred in said order as the fifth finding of fact therein (at p. 11) specifies that:

“[T]he warehouse receipts listed above held by Anglo Bank were issued and pledged by Hedgeside to Anglo Bank without the knowledge, authority or consent of Franciscan Farm and Livestock Corp., the original producer and owner of said whiskey, and without the knowledge, authority or consent of said subsequent purchasers of said whiskey and holders of valid warehouse receipts therefor, Barnhill Distilleries Company, Heaven Hill Corporation, and Petitioner, and Anglo Bank in accepting its said warehouse receipts from Hedgeside relied solely on the mere possession of said whiskey by Hedgeside as proprietor of a government bonded warehouse; in accepting its said warehouse receipts Anglo Bank was not misled or deceived by and did not suffer detriment because of any act or omission on the part of Petitioner or of Petitioner’s predecessors in title Barnhill Distilleries Company, Heaven Hill Corporation, and Franciscan Farm and Livestock Corp.”

Said finding is clearly erroneous as the uncontradicted evidence shows that the warehouse receipts referred to, held by the Anglo Bank, were issued with the knowledge and consent of Franciscan Farm and Livestock Corp., such knowledge and consent being acquired and given through its President, Richard I. Stone. Said finding is also clearly erroneous as the uncontradicted evidence shows that the Anglo Bank, in accepting its warehouse receipts,

relied on the known business of Hedgeside as a producer and seller of distilled spirits and whiskey and not on its mere naked possession of such spirits and whiskey. Said finding is also clearly erroneous as the uncontradicted evidence shows that the Anglo Bank was misled and deceived and suffered detriment because of the failure on the part of the reclamation petitioner and its predecessors in title to remove from the premises of the bankrupt the whiskey and spirits assertedly purchased. Finally, said quoted finding is erroneous as the uncontradicted evidence shows that Barnhill Distilleries Company, by reason of its prior consent to a course of conduct on the part of said Richard I. Stone, consented to Stone issuing warehouse receipts covering the property in question produced by Franciscan Farm and Livestock Corp. in the name of the bankrupt and consented to his representing that the bankrupt (Hedgeside) was the owner thereof.

10. The Referee erred in said order as the sixth finding of fact therein (at p. 12) specifies that the bankrupt charged a "reasonable rate" for storage of liquor and spirits on its premises. Said finding is clearly erroneous as the uncontradicted evidence shows that the bankrupt did not charge a reasonable rate but merely an arbitrary and nominal rate.

11. The Referee erred in said order as the seventh finding of fact therein (at p. 12) specifies that copies of warehouse receipts therein referred to were kept at the warehouse where the goods in question were stored. Said finding of fact is clearly erroneous as the uncontradicted evidence shows that copies of said warehouse receipts were not kept at said ware-

house but were kept in a separate building near said warehouse.

12. The Referee erred in said order as the eighth finding of fact therein (at p. 12) specifies that the Anglo Bank was not a creditor of Franciscan Farm and Livestock Corp. This finding is clearly erroneous and not supported by any evidence as the uncontradicted evidence shows and requires a finding that the Anglo Bank was a creditor of the corporation referred to as defined by the applicable California law due to the existence of four causes of action against Franciscan which arose during the year 1948.

13. The Referee erred in said order as the second conclusion of law therein specifies that the reclamation petitioner was the holder of "valid warehouse receipts." Said conclusion of law is wholly erroneous as the issuer of the documents referred to was not a "warehouseman" as defined by the applicable laws of the State of California and consequently had no power or authority to issue "valid warehouse receipts."

14. The Referee erred in said order as the third conclusion of law therein specifies that a pledge by the bankrupt to the Anglo Bank carried no title to or interest in the whiskey referred to. Said conclusion of law is erroneous as the course of conduct and prior consent of the Franciscan Farm and Livestock Corp., its officers, directors and stockholders, to the actions of Richard I. Stone, the President of the bankrupt and the President of said Franciscan Farm and Livestock Corp., clothed Stone with the power to make a pledge of whiskey and spirits pro-

duced by said Franciscan Farm and Livestock Corp. and Stone exercised this power by pledging to the Anglo Bank said whiskey, thereby giving Anglo Bank an interest therein good as against said Franciscan Farm and Livestock Corp. and Barnhill, the wholly owned subsidiary of Glaser Bros., a fifty per cent shareholder of Franciscan.

15. The Referee erred in said order as the fourth conclusion of law therein specifies that a transfer of whiskey and spirits produced by Franciscan Farm and Livestock Corp. to a warehouse operated by the bankrupt constitutes a valid delivery and change of possession within the meaning of Section 3440 of the Code of Civil Procedure of the State of California (question Civil Code). Said conclusion of law is erroneous as Franciscan, the transferor, and Hedgeside, the bankrupt, were under the complete domination and control of the same man, Richard I. Stone, and to move whiskey and spirits from the warehouse of one to the warehouse of the other brought about no change of possession as required by Section 3440 of the Civil Code.

16. The Referee erred in said order as the fifth conclusion of law therein specifies that the bankrupt was a "warehouseman" as defined by the California statutes and was authorized to issue valid warehouse receipts. The conclusions of law referred to are erroneous as the uncontradicted evidence shows that the bankrupt was neither in the business of storing goods nor was it storing goods for profit. Consequently it was not a "warehouseman" as defined by the California statutes and accordingly had no

power to issue, and could not issue, valid warehouse receipts.

17. The Referee erred in said order as the sixth conclusion of law specifies that the California Uniform Warehouse Receipts Act was the exclusive statute controlling the transfer of title and ownership of the whiskey and spirits in question, for all purposes, during the times when the bankrupt was a bailee of such goods. He also erred since he specified that Section 3440 of the Code of Civil Procedure of the State of California has no application. Said conclusion of law is erroneous as Section 3440 of the California Civil Code (the governing code provision) not only applies but is the exclusive statute applying to the validity of the transfers of title as against creditors, since the goods sold remained in the vendor's possession, as the uncontradicted evidence shows that the provisions of Section 3440.5 of the California Civil Code (the exception) were not complied with.

18. The Referee erred in said order as the seventh conclusion of law therein specifies that transfers of the type referred to in said conclusion satisfied the provisions of Section 3440 of the Civil Code treating with the requirements of immediate delivery and actual and continued change of possession. Said conclusion of law is erroneous as the uncontradicted evidence shows, and indeed the findings of fact recite, that all goods which are the subject matter of the reclamation petition filed by Schenley Industries, Inc. have never left the bankrupt's possession and now are in the bankrupt's possession. There has consequently been no change of possession sufficient

to satisfy the provisions of Section 3440 of the California Civil Code.

19. The Referee erred in said order as the ninth conclusion of law specifies that the reclamation petitioner, Schenley Industries, Inc., is the exclusive owner of the 8,933 barrels of whiskey and spirits therein referred to and is entitled to the immediate possession thereof. Said conclusion of law is erroneous as the uncontradicted evidence presented shows that the Trustee in bankruptcy, as a representative of creditors of the bankrupt, is entitled to the possession of all whiskey and spirits referred to as against the reclamation petitioner, because of the failure of the reclamation petitioner to take immediate and continued possession of said whiskey and spirits as required by the provisions of Section 3440 of the California Civil Code.

20. The Referee erred in finding in said order in paragraphs 4a, 4b, and 4c that a true and correct summary of the evidence of the respective purchases referred to appeared respectively in Exhibits B, C and D attached to said order.

21. The Referee erred in finding in said order that reclamation petitioner at any time held all the indicia of ownership for any whiskey or spirits for reasons above given.

22. The Referee erred in finding in said order that duplicate warehouse receipts were at any time issued to Anglo Bank.

23. The Referee erred in not finding in said order that undersigned petitioners were entitled to retain exclusive possession of said 8,933 barrels of whiskey and spirits as against reclamation petitioner.

Wherefore, your petitioners pray that said order be reviewed by a judge of the United States District Court having jurisdiction of the above-entitled bankruptcy proceedings in accordance with the provisions of the National Bankruptcy Act, that said order be reversed, that the reclamation petition brought by Schenley Industries, Inc. be dismissed, and that your petitioners have such other and further relief as is just.

Dated: February 19, 1952.

/s/ CHARLES W. EBNOTHER,
Trustee in Bankruptcy, Petitioner.

/s/ FRANCIS P. WALSH,
Attorney for Petitioner, the Trustee
in Bankruptcy.

THE ANGLO CALIFORNIA NA-
TIONAL BANK OF SAN FRAN-
CISCO,

/s/ By J. H. HOGAN,
Vice President, Petitioner.

/s/ FREDERICK M. FISK,

/s/ CHICKERING & GREGORY,
Attorneys for Petitioner, The Anglo California Na-
tional Bank of San Francisco.

Acknowledgment of Service attached.

[Exhibit A—Order on Reclamation Petition
is set out at pages 15-42 of this printed record.]

[Endorsed]: Filed Feb. 19, 1952.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
TO REVIEW RELATIVE TO SCHENLEY
INDUSTRIES, INC., PETITION FOR REC-
LAMATION

The undersigned, one of the Referees in Bankruptcy, in accordance with the provisions of Section 39(a)(8) of the Bankruptcy Act, hereby certifies as follows:

I. — Preliminary Proceedings

On May 17, 1949 an involuntary Petition in Bankruptcy was filed against Hedgeside Distillery Corporation. Thereafter, on June 2, 1949, the said Corporation was adjudicated a bankrupt and the matter was referred to the undersigned, as Referee in Bankruptcy, to take such further proceedings as may be required by said Bankruptcy Act. That on July 26, 1949 Charles W. Ebnother was duly elected Trustee of said bankrupt estate and ever since has been and still is the duly qualified and acting Trustee.

That on the 3rd day of October, 1949, Schenley Industries, Inc., filed a Reclamation Petition praying that an order be made directing Charles W. Ebnother, Trustee, to surrender to said petitioner in reclamation 8,933 barrels of whiskey and grain spirits. In said petition Schenley Industries, Inc. stated that Anglo California National Bank of San Francisco claims an interest in said property adverse to said petitioner.

(The original Reclamation Petition filed October

3, 1949, is forwarded herewith and made a part of this Certificate.)

That on the 18th day of October, 1949, Charles W. Ebnother, Trustee filed his answer to the Reclamation Petition filed by Schenley Industries, Inc.

(The original answer of Charles W. Ebnother as Trustee of Hedgeside Distillery Corporation, a corporation, bankrupt, to Reclamation Petition filed by Schenley Industries, Inc., is forwarded herewith and made a part of this Certificate.)

That on the 18th day of October, 1949, Anglo California National Bank of San Francisco filed its answer to Reclamation Petition filed by Schenley Industries, Inc.

(The original answer of Anglo California National Bank of San Francisco to Reclamation Petition is forwarded herewith and made a part of this Certificate.)

II. — Statement of Questions Presented

The order being reviewed states that Schenley Industries Inc. is the owner and entitled to the immediate possession of 8,933 barrels of whiskey and grain spirits that were in the possession of the above-named bankrupt as of the date of bankruptcy. Schenley Industries, Inc. holds documents purporting on their face to be warehouse receipts covering all of the property sought to be reclaimed. The Trustee in Bankruptcy contends that the transfer of said property to Schenley Industries, Inc. is invalid as to creditors of said bankrupt since the reclamation petitioner failed to take possession of said property as required by Section 3440 of the Civil

Code of the State of California. The Trustee in Bankruptcy also contends that the documents designated "warehouse receipts" are insufficient in law to avoid the effect of said Section 3440 claiming that the issuer of said receipts was not a "warehouseman" as defined by the Uniform Warehouse Receipts Act and the applicable California statutes and, therefore, not within the exception of Section 3440.5 of said Civil Code. The Anglo California National Bank of San Francisco has set up a claim of title in itself as to a portion of said whiskey and spirits due to a pledge made to it by the bankrupt and based on duplicate warehouse receipts.

III. — Hearing

At the time and place fixed for the hearing of Schenley Industries, Inc.'s Reclamation Petition there appeared before the undersigned Messrs. Bronson, Bronson & McKinnon by and through Kirke La Shelle, Esq. and John F. Ward, Esq. representing the petitioning claimant; Messrs. Chickering & Gregory by and through Frederick M. Fisk, Esq. and Bruce M. Casey, Jr., Esq. and said Trustee in Bankruptcy being represented by Francis P. Walsh, Esq. Said matter was heard and considered by the undersigned Referee in Bankruptcy upon the record and pleadings aforesaid upon oral and documentary evidence upon oral arguments and briefs filed by counsel.

(Reporter's transcripts of proceedings Volumes I to IX inclusive, covering hearings from October 18, 1949, to December 11, 1950, are forwarded herewith.)

That upon the conclusion of the testimony taken on December 11, 1950, the undersigned Referee in Bankruptcy directed counsel for the respective parties to submit written memoranda upon the issues raised by said Reclamation Petition.

(There is forwarded herewith Petitioner's Opening Brief filed February 3, 1951; Brief of Respondents, The Trustee in Bankruptcy and The Anglo California National Bank of San Francisco, in opposition to Reclamation Petition of Schenley Industries, Inc., filed April 24, 1951; Closing Brief for Petitioner Schenley Industries, Inc., on Petition For Reclamation, filed August 11, 1951.)

That on the 10th day of January, 1952, the undersigned Referee in Bankruptcy made and entered in said proceedings Order on Reclamation Petition.

(The original Order on Reclamation Petition is forwarded herewith as a part of this Certificate.)

IV. — Findings

The undersigned Referee in Bankruptcy found:

1. Petitioner herein is now and at all times herein mentioned was a corporation authorized to do and doing business within the State of California. Prior to January 4, 1949, the corporate name of petitioner was "Schenley Distillers Corporation" and on said date the corporate name of petitioner was changed to "Schenley Industries, Inc."

2. The bankrupt, Hedgeside Distillery Corporation, hereinafter referred to as "Hedgeside", was duly adjudicated as a bankrupt on or about June 2, 1949, an involuntary Petition in Bankruptcy having been filed in the above-entitled Court by three of its

creditors on or about May 17, 1949; on or about June 2, 1949, said bankruptcy proceedings were duly referred to the Honorable Bernard J. Abrott, Referee in Bankruptcy; on or about July 26, 1949; Charles W. Ebnother, Esq. was duly appointed Trustee of the property of said bankrupt, and thereafter qualified and is now, and at all times during the pendency of the Reclamation Petition has been, the duly appointed, qualified and acting Trustee in Bankruptcy of said bankrupt; the Anglo Bank is, and was at all times mentioned herein, a national banking association with its principal office at San Francisco, California.

3. At the time of the filing of said involuntary Petition in Bankruptcy, to-wit; on or about May 17, 1949, the bankrupt had in its possession and the Trustee has at all times since July 26, 1949, and now has in his possession the following described property:

8,933 barrels of whiskey and grain spirits stored in bond by the bankrupt for petitioner in Internal Revenue Bonded Warehouse No. 2, Hedgeside Distillery Corporation, Napa, California, the serial numbers of said barrels and warehouse receipt data being set out in Exhibit A hereto, incorporated by this reference herein and made a part hereof for all purposes;

Petitioner has made demand on the Trustee for the surrender of said 8,933 barrels of whiskey and grain spirits, and said Trustee has failed and refused to surrender the same to petitioner.

4. Said 8,933 barrels of whiskey and grain spirits

were purchased for value by petitioner from the respective owners thereof as set forth below; said owners intended to transfer the ownership and legal title thereto to petitioner on the respective dates of the transactions set forth below in exchange for the purchase price which said owners received, and at the time of the filing of said Petition in Bankruptcy said 8,933 barrels stored in bond in Internal Revenue Bonded Warehouse No. 2 were covered by warehouse receipts issued to petitioner by Hedgeside and now held by petitioner, the serial numbers and dates of issue of said warehouse receipts being set out in Exhibit A hereto, incorporated by this reference herein and made a part hereof for all purposes; said purchases and sales are made in the following manner:

(a) Petitioner purchased a total of 4,815 barrels of said spirits from Hedgeside, the bankrupt;

Beginning in March, 1947, petitioner purchased 1,293 barrels of said spirits from Hedgeside pursuant to a production contract for grain spirits dated September 17, 1945 (Petitioner's Exhibit Nos. 14 and 15) as amended (Petitioner's Exhibits Nos. 16, 17, 18, 19, 20 and 21) the documentary evidence of said purchase and sale, including warehouse receipts covering said spirits, being contained in petitioner's Exhibit No. 52; beginning in October, 1947, petitioner purchased 3,191 barrels of said spirits from Hedgeside pursuant to a production contract for grain spirits dated October 13, 1947, (Petitioner's Exhibit Nos. 22-A and 22-B) the documentary evidence of said purchase and sale being

contained in Petitioner's Exhibit Nos. 53 and 65; all of said 1,293 and 3,191 barrels of spirits purchased under said production contracts were inspected and accepted by a representative of petitioner at Hedgeside as produced, said spirits were placed in barrels furnished by petitioner for that purpose, said barrels of spirits were then immediately stored in bond in Hedgeside's Internal Revenue Bonded Warehouse No. 2, Napa, California, and warehouse receipts covering said spirits were issued by Hedgeside to petitioner which warehouse receipts are still held by petitioner, excepting that the spirits covered by warehouse receipt numbers 3665-B, 3669-B, and 3670-B were originally stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan Farm and Livestock Corp., a corporation, located at Yountville, California, and thereafter transferred in bond to Hedgeside Internal Revenue Bonded Warehouse No. 2, as set out in Petitioner's Exhibit No. 45;

Also pursuant to said contract of October 13, 1947 (Petitioner's Exhibit Nos. 22-A and 22-B) in November, 1947, petitioner purchased from Hedgeside 331 barrels of "on Hand" spirits (part of which was in fact whiskey but which has been treated by the parties throughout as grain spirits) the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 50 and 65; of the warehouse receipts now held by petitioner covering said 331 barrels, warehouse receipts Nos. 3511-B and 3512-B were issued by Hedgeside to petitioner at the time of said sale and the spirits

covered thereby were then stored in bond in Hedgeside Internal Revenue Bonded Warehouse No. 2, whereas the spirits now covered by warehouse receipts Nos. 3671-B and 3673-B were at the time of said sale stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan Farm and Livestock Corp., and thereafter transferred in bond to Hedgeside Internal Revenue Bonded Warehouse No. 2, as set out in Petitioner's Exhibit No. 45; a true and correct summary of the evidence of said purchases of the above 4,815 barrels of said spirits by petitioner from Hedgeside is set out in Exhibit "B" hereto which is incorporated herein and made a part hereof for all purposes.

(b) Petitioner purchased a total of 1,359 barrels of said grain spirits from Franciscan Farm and Livestock Corp., a California corporation;

In March and April, 1947, pursuant to a production contract for grain spirits between one R. I. Stone, d.b.a. Franciscan Farm and Livestock Corp., and petitioner, dated November 1, 1945, assigned by Stone to Franciscan Farm and Livestock Corp., a California corporation (Petitioner's Exhibits Nos. 23 and 25-B) petitioner purchased 459 barrels of said spirits from Franciscan Farm and Livestock Corp., the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit No. 49; concurrently with the production and sale of said 459 barrels of spirits said spirits were inspected and accepted by a representative of petitioner at Franciscan as produced, said spirits were placed in barrels furnished by petitioner for that purpose, and

said barrels of spirits were then stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside and warehouse receipts issued by Hedgeside to petitioner covering said barrels which warehouse receipts are still held by petitioner;

Between December, 1947 and April, 1948, pursuant to a production contract for grain spirits between Franciscan Farm and Livestock Corp. and petitioner dated October 13, 1947 (Petitioner's Exhibit Nos. 25-A and 25-B) petitioner purchased 900 barrels of said spirits from Franciscan Farm and Livestock Corp., the documentary evidence of said purchase and sale being contained in Petitioner's Exhibit Nos. 51, 64 and 50; concurrently with the purchase and sale of said 900 barrels of spirits, said spirits were inspected and accepted by a representative of petitioner at Franciscan as produced, said spirits were placed in barrels furnished by petitioner for that purpose, and said barrels of spirits were then stored in bond in Internal Revenue Bonded Warehouse No. 111 of Franciscan and covered by warehouse receipts issued by Franciscan to petitioner, and in November and December, 1948, said barrels were transferred in bond to Internal Revenue Bonded Warehouse No. 2 of Hedgeside, as set out in Petitioner's Exhibit Nos. 45 and 51, at which time the warehouse receipts for said barrels now held by petitioner were issued to petitioner by Hedgeside; a true and correct summary of the evidence of said purchases of the above 1,359 barrels of said spirits from Franciscan is set out in Exhibit "C" hereto which is incorporated herein and made a part hereof for all purposes;

(c) The balance of said 8,933 barrels of whiskey and grain spirits, totalling 2,759 barrels of whiskey, was purchased by petitioner from Heaven Hill Corporation, a California corporation, by an oral contract made between the parties in December, 1947, and performed by the parties in January, 1948, and petitioner is now the holder of warehouse receipts Nos. 3681B, 3682B, 3683B, and 3684B issued by Hedgeside to petitioner covering said whiskey now stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside; said 2,759 barrels of whiskey was originally produced by Franciscan Farm and Livestock Corp. at its distillery at Yountville, California, and continuously stored in bond since production in Internal Revenue Bonded Warehouse No. 2 of Hedgeside, subject to warehouse receipts issued from time to time to the respective owners by Hedgeside as follows:

Concurrently with its production between October, 1946, and January, 1947, 2,861 barrels of whiskey (of which said 2,759 barrels of whiskey is a part) was sold by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, a California corporation, and a wholly-owned subsidiary of Glaser Bros., a California corporation, pursuant to an oral agreement between the parties; said whiskey was stored in bond in Internal Revenue Bonded Warehouse No. 2 of Hedgeside as produced, and its sale to Barnhill Distilleries Company completed within a few days of production by delivery of Hedgeside warehouse receipts to Barnhill Distilleries Company in exchange for the agreed purchase

price of \$162,316.50 which was paid to Franciscan by Glaser Bros., the documentary evidence of said purchase and sale being contained in petitioner's Exhibit No. 7 (invoices, checks and drafts) Petitioner's Exhibit Nos. 2, 3, 4 and 5 (Cancelled warehouse receipts originally issued to Barnhill contained in Hedgeside Warehouse Receipt Book) and Anglo Bank's Exhibit No. 34 (Franciscan Journal) the parties to said purchase and sale intended to and did effect a transfer of title to said whiskey at the time said warehouse receipts were delivered to Barnhill Distilleries Company; the original purchase price was subsequently reduced to the sum of \$130,951.44 by means of a credit memorandum issued by Franciscan Farm and Livestock Corp. to Barnhill Distilleries Company, as the result of the compromise of a dispute over the transaction which later arose between the parties;

Barnhill Distilleries Company held all of said warehouse receipts covering said 2,861 barrels of whiskey from January, 1947, the date of issue of the last of said receipts, until January 3, 1948, except for two barrels which were disposed of by Barnhill during the period; on January 3, 1948, Barnhill exchanged said receipts covering 2,759 barrels of said whiskey for four negotiable warehouse receipts of Hedgeside, Warehouse Receipt Nos. 384, 385, 386 and and 387 (Petitioner's Exhibit No. 1) and in accordance with an oral agreement of sale with Heaven Hill Corporation delivered said four negotiable warehouse receipts covering said 2,859 barrels of said whiskey to Heaven Hill Corporation

in exchange for the purchase price of \$131,983.70 (Petitioner's Exhibit Nos. 8 and 9) ;

Pursuant to said oral agreement of sale between Heaven Hill Corporation and Petitioner, Heaven Hill Corporation immediately delivered said four negotiable warehouse receipts covering said 2,859 barrels of whiskey to Petitioner in exchange for the purchase price for said whiskey to Petitioner of \$150,314.77. (Petitioner's Exhibit Nos. 11A, 11B and 11C) ;

Petitioner held said four negotiable warehouse receipts covering said 2,859 barrels of whiskey from January to December, 1948, except that during this period 100 barrels of said whiskey covered by warehouse receipt No. 384 were withdrawn by Petitioner ; on December 22, 1948, Petitioner exchanged said four negotiable warehouse receipts, covering 2,759 barrels of said whiskey, for non-negotiable warehouse receipts of Hedgeside, Nos. 3681B, 3682B, 3683B, 3684B (Petitioner's Exhibit No. 26) which warehouse receipts are now and ever since said date have been held by Petitioner ;

A true and correct summary of the evidence of said transactions covering said 2,759 barrels of whiskey is set out in Exhibit "D" hereto which is incorporated herein and made a part hereof for all purposes ;

5. Anglo Bank is the holder of duplicate warehouse receipts covering 3,333 barrels of said 8,933 barrels of whiskey and spirits, said duplicate receipts having been pledged by Hedgeside to secure loans made by Anglo Bank to Hedgeside, as follows :

(a) On January 4, 1949, Hedgeside pledged to Anglo Bank as security for a loan its warehouse receipt No. 3689B purporting to cover 574 barrels of the 3,191 barrels of grain spirits described in paragraph 4-A of the above findings of fact, which spirits had been purchased by Petitioner from Hedgeside between October, 1947, and March, 1948; at the time of said pledge to Anglo Bank, Petitioner was the holder of valid Hedgeside warehouse receipts for the same 574 barrels of grain spirits, as follows:

No. of Barrels and Serial Numbers	No. and Date of Issue of Petitioner's Warehouse Receipts	No. and Date of Issue of Anglo Bank's Warehouse Receipts
69 70228-296	3525B (11-24-47))))))))) 3689B (1-5-49)
27 70942-968	3538B (Undated)	
50 70969-71018	3539B (12-8-47)	
74 71069-71142	3541B (12-10-47)	
96 71143-71238	3543B (12-11-47)	
85 71239-71323	3544B (12-12-47)	
150 71324-71473	3545B (12-15-47)	
23 71474-71496	3545B (12-15-47)	

574 Barrels

All of the above warehouse receipts now held by Petitioner for said 574 barrels of spirits were issued by Hedgeside and delivered by it to Petitioner pursuant to said production contract described in 4 (a) hereof more than one year prior to the issue and pledge by Hedgeside of Receipt No. 3689-B to Anglo Bank (Receipt No. 3538B, undated, was delivered to Petitioner on or about December 9, 1947) said warehouse receipts of Petitioner for said 574 barrels were delivered to Petitioner through Anglo

Bank, the bank acting as collection agent for Hedgeside and delivering said warehouse receipts to Petitioner in exchange for payment of Hedgeside drafts, and Anglo Bank had actual knowledge of said delivery to Petitioner of said warehouse receipts covering said 574 barrels to Petitioner;

Petitioner at all times since delivery to it of said warehouse receipts retained and held all the indicia of ownership of said 574 barrels and Hedgeside was at no time clothed with the apparent ownership of said property but held only the naked possession thereof in its capacity as a bonded warehouseman; said warehouse receipt No. 3689-B was issued and pledged by Hedgeside to Anglo Bank without Petitioner's knowledge, authority, or consent, and Anglo Bank in accepting said warehouse receipt relied solely on the mere possession of said property by Hedgeside as the proprietor of a government bonded warehouse; in accepting said warehouse receipt Anglo Bank was not misled by any act or omission on the part of Petitioner or of anyone acting on behalf of Petitioner;

(b) Between June 17, 1947 and September 16, 1948, Hedgeside pledged to Anglo Bank as security for loans to Hedgeside its warehouse receipts purporting to cover said 2,859 barrels of whiskey, described in paragraph 4 (c) hereof, which whiskey had been produced by Franciscan Farm and Livestock Corp. and sold by it to Barnhill Distilleries Company as produced; the numbers and dates of issues of said warehouse receipts pledged by Hedgeside to Anglo Bank are as follows:

No.	Date of Issue	No. of Barrels
3469-B	6-17-47	225
3470-B	6-17-47	735
3472-B	7-30-47	100
3474-B	9-10-47	100
3475-B	9-16-47	200
3476-B	9-16-47	200
3477-B	10-22-47	200
3548-B	12-17-47	200
3552-B	9-16-48	899

2,859

As set out in said paragraph 4 (c) hereof and as summarized by Exhibit "D" hereto, at the time of said purported pledges to Anglo Bank, Petitioner or Petitioner's predecessors in title were the holders of valid warehouse receipts covering said 2,859 barrels of whiskey, then stored in Hedgeside's Internal Revenue Bonded Warehouse No. 2, the last warehouse receipt for said whiskey having been issued to Barnhill Distilleries Company more than four months before the first warehouse receipt for said whiskey was pledged to Anglo Bank;

Petitioner, or Petitioner's predecessors in title, Heaven Hill Corporation and Barnhill Distilleries Company, at all times since delivery to them of their warehouse receipts covering said whiskey, retained and held all the indicia of ownership of said whiskey and Hedgeside was at no time clothed with the apparent ownership of said property but held only the naked possession thereof in its capacity as a bonded warehouseman; the warehouse receipts listed above held by Anglo Bank were issued and pledged by Hedgeside to Anglo Bank without the knowledge, authority or consent of Franciscan Farm and Live-

stock Corp., the original producer and owner of said whiskey, and without the knowledge, authority or consent of said subsequent purchasers of said whiskey and holders of valid warehouse receipts therefor, Barnhill Distillers Company, Heaven Hill Corporation, and Petitioner, and Anglo Bank in accepting its said warehouse receipts from Hedgeside relied solely on the mere possession of said whiskey by Hedgeside as proprietor of a government bonded warehouse; in accepting its said warehouse receipts Anglo Bank was not misled or deceived by and did not suffer detriment because of any act or omission on the part of Petitioner or of Petitioner's predecessors in title Barnhill Distilleries Company, Heaven Hill Corporation, and Franciscan Farm and Livestock Corp.

6. At all times herein mentioned up to the date of filing of said involuntary Petition in Bankruptcy, Hedgeside's Internal Revenue Bonded Warehouse No. 2 held a permit to operate said warehouse duly issued by the United States, Alcohol Tax Unit Form 27-D (Petitioner's Exhibit Nos. 46 and 47) and at all of said times held a "Distilled Spirits Manufacturer's License" and a "Public Warehouse" license duly issued by the Board of Equalization of the State of California; at all of said times Hedgeside did not advertise for or solicit customers for the storing of spirits and whiskey and did not regularly store goods for the public generally, but in the regular course of its business Hedgeside stored in bond whiskey and spirits produced in its own distillery and whiskey and spirits owned by a

limited number of persons licensed to deal in bulk whiskey and spirits and with whom Hedgeside did business, charging a reasonable rate in the regular course of business for such storage.

7. The principal place of business of Hedgeside and its Internal Revenue Bonded Warehouse No. 2 at all times herein mentioned was located at Napa, California, and at all of said times copies of warehouse receipts issued by Hedgeside covering whiskey and spirits stored in bond in its Internal Revenue Bonded Warehouse No. 2 were kept at said principal place of business and at said warehouse.

8. At all times herein mentioned during the year 1948 Anglo Bank was not a creditor of Franciscan Farm and Livestock Corp., a corporation.

V. — Conclusions of Law

The Court concluded, as matters of law, that:

1. At all times hereinabove mentioned and in each of said transactions wherein Petitioner purchased said whiskey and spirits, Petitioner was and is a bona fide purchaser of said whiskey and spirits totalling 8,933 barrels.

2. At the time of said pledge by Hedgeside to Anglo Bank of duplicate warehouse receipts for said 574 barrels of spirits hereinabove described, Hedgeside was not the owner of said spirits nor did it have any right, title or interest in or to said spirits except as bailee for Petitioner, who was at said time the owner of said spirits and the holder of valid warehouse receipts for the same; Anglo Bank has no right, title or interest whatsoever in or to said

574 barrels of spirits by virtue of said pledge or said duplicate warehouse receipts, or otherwise.

3. Hedgeside was at no time the owner of said 2,759 barrels of whiskey hereinabove described, nor did Hedgeside have any right, title or interest to said whiskey except as bailee for the true owners thereof, and said pledge by Hedgeside to Anglo Bank of duplicate warehouse receipts for said whiskey carried no title to or interest in said whiskey to Anglo Bank; prior to said pledge of said duplicate warehouse receipts said whiskey consisting of said 2,859 barrels had been sold by Franciscan Farm and Livestock Corp., the producer and original owner of said whiskey, to Barnhill Distilleries Company, which thereby became the owner of said whiskey and which passed good title thereto to Heaven Hill Corporation, Petitioner's predecessor in title; Anglo Bank has no right, title or interest whatsoever in or to said whiskey, or any part thereof, by virtue of said pledge or duplicate warehouse receipts, or otherwise, and Anglo Bank has no right, title or interest in or to the balance of said 8,933 barrels of whiskey and spirits, or any part thereof.

4. At all times hereinabove mentioned when whiskey and spirits produced by Franciscan Farm and Livestock Corp. were transferred into storage in Hedgeside's said warehouse concurrently with the sale of said whiskey and spirits, there was an immediate delivery and an actual and continued change of possession of said goods within the meaning of Section 3440 of the Code of Civil Procedure of the Code of Civil Procedure of the State of California.

5. At all times hereinabove mentioned prior to the filing of said involuntary Petition in Bankruptcy, Hedgeside was a warehouseman as defined in the California Uniform Warehouse Receipts Act, and at all of said times was lawfully engaged in the business of storing goods for profit, and was authorized to and did issue valid warehouse receipts for goods so stored, including said warehouse receipts now held by Petitioner for said 8,933 barrels of whiskey and spirits; at all said times Hedgeside was not a public utility under the Public Utilities Act of California.

6. At all times hereinabove mentioned when Hedgeside issued its warehouse receipts as bailee for said 8,933 barrels of whiskey and spirits stored in its Internal Revenue Bonded Warehouse No. 2, the California Uniform Warehouse Receipts Act was the exclusive statute governing and controlling the transfer of title to said whiskey and spirits and the ownership thereof, for all purposes, and the provisions of Section 3440 of the Code of Civil Procedure of the State of California had and has no application whatsoever to said whiskey and spirits so stored under said warehouse receipts.

7. At all times hereinabove mentioned Hedgeside was the lawful proprietor of a United States Government bonded warehouse pursuant to and authorized by the laws and regulations of the United States, namely, Internal Revenue Bonded Warehouse No. 2; at all times hereinabove mentioned when portions of said 8,933 barrels of whiskey and spirits were stored in the bonded warehouse of

Franciscan Farm and Livestock Corp. said corporation was the lawful proprietor of a United States Government bonded warehouse pursuant to and authorized by the laws of the United States, namely, Internal Revenue Bonded Warehouse No. 111; at all of said times the transfer of all or part of said 8,933 barrels of whiskey into bond in said warehouses subjected said whiskey and spirits to the statutes contained in the Internal Revenue Code of the United States, and to the regulations promulgated thereunder, and said transfers into bond concurrently with the sale of said whiskey and spirits were accompanied by an immediate delivery and an actual and continued change of possession within the meaning of Section 3440 of the Code of Civil Procedure of the State of California.

8. At all times hereinabove mentioned when Hedgeside issued its warehouse receipts to petitioner for all or part of said 8,933 barrels of whiskey and spirits, Hedgeside recognized the conveyance to Petitioner of said goods and confirmed said conveyance by the making of the storage contract contained in said warehouse receipts, and Hedgeside as bailee for Petitioner was and is estopped from disputing Petitioner's title to said goods as against Hedgeside.

9. Said bankrupt, Hedgeside and its estate, and said Trustee in Bankruptcy, have no right, title or interest whatsoever in or to said 8,933 barrels of whiskey and spirits, or any part thereof, either legal or equitable; Petitioner is the exclusive owner of said 8,933 barrels of whiskey and spirits and is entitled to the immediate possession thereof.

Based upon said Findings and Conclusions the undersigned Referee made the following Order:

“It Is Ordered that Petitioner’s said Reclamation Petition be and the same is hereby granted, and the said Trustee is ordered and directed to forthwith surrender and deliver said 8,933 barrels of whiskey and spirits to Petitioner.”

V. — Review

That subsequent to the 10th day of January, 1952, and within the time allowed by law (pursuant to extension of time regularly granted) said Charles W. Ebnother, Trustee in Bankruptcy, and the Anglo California National Bank of San Francisco filed Petition for Review, dated and filed February 19, 1952.

(The original Petition for Review is forwarded herewith as a part of this Certificate.)

Dated: March 5, 1952.

Respectfully submitted,

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

The following documents are forwarded herewith as a part of this Certificate:

1. Reclamation Petition.
2. Answer of Charles W. Ebnother as Trustee of Hedgeside Distillery Corporation, a corporation, Bankrupt, to Reclamation Petition filed by Schenley Industries, Inc.
3. Answer to Reclamation Petition (filed by The Anglo California National Bank of San Francisco).

4. Petitioner's Opening Brief.
5. Brief of Respondents, the Trustee in Bankruptcy and The Anglo California National Bank of San Francisco, in Opposition to Reclamation Petition of Schenley Industries, Inc.
6. Closing Brief for Petitioner Schenley Industries, Inc., on Petition for Reclamation.
7. Order on Reclamation Petition.
8. Petition for Review.
9. Volumes I to IX inclusive, Transcript of Testimony.

[Endorsed]: Filed March 6, 1952.

[Title of District Court and Cause.]

NOTICE

Notice Is Hereby Given that the "Referee's Certificate on Petition to Review Relative to Schenley Industries, Inc., Petition for Reclamation" was forwarded to the Clerk of the above-entitled Court on the 5th day of March, 1952, and in the ordinary course of events should be on the Calendar in the Post Office Building, Sacramento, California, on the 17th day of March, 1952, at 10:00 o'clock a.m. under the provisions of Rules of Practice of District Court of the United States, Northern District, of California (Bankruptcy Rules, Rule 8) effective July 1, 1944. It is suggested that Counsel representing the interested parties should check with the Clerk of the Court (Northern Division, at Sacramento) to make

certain that said matter will come on for hearing on said above-mentioned date.

Dated: March 5, 1952.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 6, 1952.

[Title of District Court and Cause.]

SUPPLEMENT TO REFEREE'S CERTIFICATE ON PETITION TO REVIEW RELATIVE TO SCHENLEY INDUSTRIES, INC., PETITION FOR RECLAMATION

On Page 3, under the title "Hearing", on the Referee's Certificate forwarded to the United States District Court on March 5, 1952, there appears the following statement:

"Messrs. Chickering & Gregory by and through Frederick M. Fisk, Esq. and Bruce M. Casey, Jr., Esq. and said Trustee in Bankruptcy being represented by Francis P. Walsh, Esq."

The Certificate should read:

"Messrs. Chickering & Gregory by and through Frederick M. Fisk, Esq. and Bruce M. Casey, Jr., Esq., representing the Anglo California National Bank of San Francisco, and said Trustee in Bank-

ruptcy being represented by Francis P. Walsh, Esq.”

Dated: March 6, 1952.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed March 7, 1952.

In the District Court of the United States for
the Northern District of California,
Northern Division

No. 11327

In the Matter of
HEDGESIDE DISTILLERY CORPORATION
a corporation,
Bankrupt.

OPINION AND ORDER

The trustee of a bankrupt distillery whose president is languishing in San Quentin and two bona fide claimants of opposing interests in thousands of barrels of whisky and grain spirits—these are the protagonists in this complicated forensic drama.

At stake is the ownership of merchandise valued at hundreds of thousands of dollars. The hearing before the Referee in Bankruptcy consumed thirty-six days of trial time. The testimony is reported in 2,523 pages of transcript. In addition, thousands of documents were introduced in evidence. Yet, as will

be more fully developed presently, the very parties that are here objecting to the Referee's order have repeatedly insisted that "the material facts are not in dispute" and that "the present petition for review presents only questions of law". The questions of law, however, are many, diverse, and complex.

1. The Dramatis Personae

Because the cast of characters is somewhat large, the Court is adopting the shortened individual and corporate designations used by the parties in this Court and in the hearings before the Referee in Bankruptcy:

Schenley Industries, Inc.: "Schenley".

Hedgeside Distillery Corporation: "Hedgeside".

R. I. Stone: "Stone".

Franciscan Farm and Livestock Corporation:
"Franciscan".

Glaser Bros: "Glaser".

Barnhill Distilleries Company: "Barnhill".

The Anglo California National Bank of San Francisco: "Bank".

Heaven Hill Company: "Heaven Hill".

The word "barrels" includes the contents as well as the receptacles.

2. The Reclamation Petition

On October 3, 1949, Schenley filed a reclamation petition in this Court. The petition sets forth that on or about May 17, 1949, an involuntary petition in bankruptcy was filed in this Court by certain named creditors of Hedgeside, and that the latter was adjudicated a bankrupt on June 2, 1949, on

which date the proceedings were referred to Bernard J. Abrott, Referee in Bankruptcy.

The reclamation petition contains the following further allegations:

On July 26, 1949, Charles W. Ebnoter was appointed Trustee of the bankrupt's property. At the time of the filing of the petition in bankruptcy, the bankrupt had in its possession, and the Trustee now holds, 2,893 barrels of whisky and 6,040 barrels of grain spirits, or a total of 8,933 barrels, stored in bond for Schenley in Hedgeside's Internal Revenue Bonded Warehouse No. 2, hereinafter referred to as "No. 2", at Napa, California.

The barrels of whisky and grain spirits are covered by warehouse receipts issued by Hedgeside, the bankrupt, and now held by Schenley, which is the owner of the whisky and the spirits.

Schenley has been informed and believes and therefore alleges that the Bank claims an adverse interest in the property, and is therefore a proper party to this proceeding.

The petition closes with a prayer that the Trustee be ordered to surrender the 8,933 barrels of whisky and spirits to Schenley.

3. The Trustee's Answer

On October 18, 1949, the Trustee and the Bank filed separate answers to the reclamation petition.

The Trustee admits most of the allegations of the petition, but he denies that the barrels in question belong to Schenley. He admits that the barrels are covered by warehouse receipts issued by Hedgeside

to Schenley, but alleges that the receipts are void as against Hedgeside's unsecured creditors, in that at the time the receipts were issued, the barrels, which are described in an exhibit attached to the reclamation petition were, and are now, Hedgeside's property, "and there was no transfer accompanied by any delivery or change of possession" from Hedgeside to Schenley, as required by Section 3440 of the Civil Code of California, *infra*, hereinafter referred to simply as "Section 3440".

The prayer asks that the legal title to the whisky and spirits be adjudicated in the Trustee, clear of any liens or claims of Schenley or the Bank. Though in an earlier part of his answer the Trustee denies that he has possession of the whisky and the grain spirits, in his prayer he admits it.

4. The Bank's Answer

Like the Trustee, the Bank denies that the barrels and their contents belong to Schenley, and alleges that any issuance by Hedgeside of the warehouse receipts on barrels of whisky mentioned in the aforesaid Schenley exhibit is void, as such receipts are subsequent to receipts issued by Hedgeside to the Bank, to secure repayment of money advances made by the Bank to Hedgeside. It is further stated that the warehouse receipts mentioned in the Schenley exhibit, together with those issued to Schenley's predecessors in title, are void as against Hedgeside's unsecured creditors, in that at the time the receipts were issued the barrels purported to be transferred by them were the property of Hedge-

side and there was no delivery followed by any actual and/or continued change of possession.

The answer admits that the Bank claims an interest in the 8,933 barrels of whisky and spirits. It alleges that on certain specified dates the Bank lent Hedgeside "in good faith" certain sums of money, and received as security a pledge of whisky and spirits covered by warehouse receipts, as per a table incorporated in the answer. The table lists 2,859 barrels of whisky, valued at \$99,703, and 574 barrels of spirits, valued at \$18,130. It is further alleged that no part of these amounts have been repaid.

Unlike the Trustee, the Bank prays simply that Schenley "take nothing by its petition for reclamation."

5. The Referee's Findings and Conclusions

On January 10, 1952, the Referee issued an Order, Findings of Fact, and Conclusions of Law. What follows is a summary of that document.

The 8,933 barrels of whisky and spirits were purchased for value by Schenley from the respective owners thereof as set forth below. The owners intended to transfer the ownership and legal title to Schenley in exchange for the purchase price that they received. At the time of the filing of the petition in bankruptcy the 8,933 barrels, stored in bond in No. 2, were covered by warehouse receipts issued by Hedgeside to Schenley and now held by the latter.

Schenley's purchases were made in the following manner:

(a) Schenley purchased a total of 4,815 barrels of spirits from Hedgeside, as follows:

Beginning in March, 1947, Schenley bought 1,293 barrels pursuant to a production contract for grain spirits, dated September 17, 1945. Beginning in October, 1947, Schenley purchased 3,191 barrels pursuant to a production contract dated October 13, 1947. All of these 1,293 and 3,191 barrels were inspected and accepted by a representative of Schenley at Hedgeside as produced. The spirits were placed into barrels furnished by Schenley, and were then immediately stored in No. 2, except as hereinafter noted. Warehouse receipts covering the merchandise were issued by Hedgeside to Schenley, and are still held by the latter. The spirits covered by warehouse receipts Nos. 3665-B, 3669-B, and 3670-B were originally stored in Internal Revenue Bonded Warehouse No. 111, hereinafter referred to as "No. 111", of Franciscan, at Yountville, California, and were thereafter transferred in bond to No. 2.

Also pursuant to the contract of October 13, 1947, in November, 1947, Schenley purchased from Hedgeside 331 barrels of "on hand" spirits — part of which lot was in fact whisky but which has been treated by the parties throughout as grain spirits. Of the receipts now held by Schenley covering these 331 barrels, receipts Nos. 3511-B and 3512-B were issued by Hedgeside to Schenley at the time of the sale and the spirits covered thereby were then stored in bond in No. 2, whereas the spirits now covered by receipts Nos. 3671-B and 3673-B were

at the time of the sale stored in bond in No. 111, and thereafter transferred in bond to No. 2.

(b) Schenley purchased a total of 1,359 barrels of grain spirits from Franciscan. In March and April, 1947, pursuant to a production contract for grain spirits between Stone, d.b.a. as Franciscan, and Schenley, dated November 1, 1945, assigned by Stone to Franciscan, Schenley purchased 459 barrels of spirits from Franciscan. Concurrently with the production and sale of these barrels, the spirits were inspected and accepted by a representative of Schenley at Franciscan as produced. The spirits were placed into barrels furnished by Schenley and were then stored in bond in No. 2. Warehouse receipts were issued by Hedgeside to Schenley covering those barrels, and are still held by Schenley.

Between December, 1947, and April, 1948, pursuant to a production contract for spirits between Franciscan and Schenley, dated October 13, 1947, Schenley purchased 900 barrels of the spirits from Franciscan. As before, the spirits were inspected, accepted, and barreled, and were then stored in bond in No. 111, being covered by receipts from Franciscan to Schenley. In November and December, 1948, the barrels were transferred in bond to No. 2. At that time the receipts for the barrels were issued to Schenley by Hedgeside, and are now held by the former.

(c) The rest of the 8,933 barrels of alcoholic products, totaling 2,759 barrels of whisky, were purchased by Schenley from Heaven Hill, by oral contract made in December, 1947, and performed by

the parties in January, 1948. Schenley is now the holder of warehouse receipts Nos. 3681B, 3682B, 3683B, and 3684B issued by Hedgeside to Schenley covering that whisky, now stored in bond in No. 2. These 2,759 barrels of whisky were originally produced by Franciscan at its distillery at Yountville, and were continuously stored since production in No. 2, subject to warehouse receipts issued from time to time to the respective owners by Hedgeside as follows:

Concurrently with its production between October, 1946, and January, 1947, 2,861 barrels of whisky—of which the said 2,759 are a part—were sold by Franciscan to Barnhill, a wholly-owned subsidiary of Glaser, pursuant to an oral agreement. The whisky was stored in bond in No. 2 as produced, and its sale to Barnhill was completed within a few days of production by delivery of Hedgeside receipts to Barnhill, in exchange for the agreed purchase price of \$162,316.50, which was paid to Franciscan by Glaser. The parties intended to and did effect a transfer of title to this whisky at the time the receipts were delivered to Barnhill. The original purchase price was later reduced to \$130,951.44 by a credit memorandum from Franciscan to Barnhill, as the result of a compromise.

For a proper understanding of the Bank's argument in connection with this credit memorandum, some elaboration is here necessary.

Marcus Glaser was president of Barnhill and president and general manager of Glaser, which holds all of the stock of Barnhill. He is also the

vice president and one of the directors of Franciscan, which was owned 50 per cent by Glaser.

Despite the fact that Marcus Glaser considered the original price of the whisky purchased from Franciscan to be the market value—\$1 an original proof gallon—he forced Stone, the president and general manager of both Hedgeside and Franciscan, to issue a credit memorandum to Barnhill amounting to \$31,365.06. This credit was given on the strength of a certain “pre-incorporation agreement”, whereby “no one was allowed to buy whisky any cheaper than Barnhill.” Marcus Glaser told Stone “if he (Stone) sold Hedgeside at—whatever the price—, then Barnhill was entitled to the same price”.

Resuming our examination of the Referee’s findings, we learn that Barnhill held all of the warehouse receipts covering these 2,861 barrels from January, 1947, the date of issue of the last receipt, until January 3, 1948, except for two barrels that were disposed of by Barnhill during the period. On January 3, 1948, Barnhill exchanged the receipts covering 2,759 (sic)¹ barrels for four negotiable

¹ This is evidently a clerical error in the Referee’s Findings. The figure should be 2,859, since the 100 barrels of whisky covered by Receipt No. 384, mentioned hereinafter, were not withdrawn until some time during the period “from January to December, 1948”. Nor does the figure “2,759” agree with the number of barrels, italicized here, shown elsewhere in the same paragraph. This same error has been carried over into the Receiver’s certificate, page 10.

warehouse receipts of Hedgeside—Nos. 384, 385, 386 and 387—and in accordance with an oral agreement of sale with Heaven Hill delivered these four negotiable receipts covering these 2,859 barrels to Heaven Hill for \$131,983.70.

Pursuant to the same oral agreement of sale between Heaven Hill and Schenley, Heaven Hill immediately delivered the four negotiable receipts covering the 2,859 barrels² to Schenley for \$150,314.77. Schenley held these receipts from January to December, 1948, except that during this period 100 barrels, covered by Receipt No. 384, were withdrawn by Schenley.² On December 22, 1948, Schenley exchanged the four negotiable receipts, covering 2,759 barrels of the whisky, for non-negotiable ones of Hedgeside—Nos. 3681B, 3682B, 3683B and 3684B—which receipts are still held by Schenley.

The Bank is the holder of duplicate warehouse receipts covering 3,333 barrels of the 8,933 barrels of whisky and spirits, the said duplicate receipts having been pledged by Hedgeside to secure loans made by the Bank to Hedgeside, as follows:

On January 4, 1949, Hedgeside pledged to the Bank as security for a loan its warehouse receipt No. 3689B, purporting to cover 574 barrels of the 3,191 barrels of grain spirits described in subdivision (a), *supra*. These 3,191 barrels had been purchased by Schenley from Hedgeside between October, 1947, and March, 1948. At the time of the pledge to the Bank, Schenley was the holder of valid

² See Note 1.

Hedgeside warehouse receipts for the same 574 barrels of grain spirits, as follows:

No. of Barrels and Serial Numbers	No. and Date of Issue of Schenley's Warehouse Receipts	No. and Date of Issue of the Bank's Warehouse Receipts
69 70228-296	3525B (11-24-47))))))))))) 3689B (1-5-49)
27 70942-968	3538B (Undated)	
50 70969-71018	3539B (12-8-47)	
74 71069-71142	3541B (12-10-47)	
96 71143-71238	3543B (12-11-47)	
85 71239-71323	3544B (12-12-47)	
150 71324-71473	3545B (12-15-47)	
23 71474-71496	3545B (12-15-47)	

574 Barrels

All of the above warehouse receipts now held by Schenley for the 574 barrels of spirits were issued by Hedgeside and delivered by it to Schenley pursuant to the production contract described in subsection (a), supra,³ more than one year prior to the issue and pledge by Hedgeside of Receipt No. 3689B to the Bank. Receipt No. 3538B, undated, was delivered to Schenley on or about December 9, 1947. Schenley's warehouse receipts for these 574 barrels were delivered through the Bank, which acted as the collection agent for Hedgeside and delivered the warehouse receipts to Schenley in exchange for payment of Hedgeside drafts. The Bank had actual knowledge of the delivery to Schenley of the receipts covering the 574 barrels to Schenley.

At all times since the delivery to it of the ware-

³ There are two "production contracts" mentioned in subsection (a). The Referee evidently has in mind the contract of October 13, 1947.

house receipts, Schenley has retained all the indicia of ownership of the 574 barrels, and Hedgeside was at no time clothed with the apparent ownership of that property, but held only the naked possession thereof in its capacity as a bonded warehouseman. Warehouse receipt No. 3689B was issued and pledged by Hedgeside to the Bank without Schenley's knowledge, authority, or consent, and the Bank in accepting the receipt relied solely on the mere possession of the property by Hedgeside, as the proprietor of a Government bonded warehouse. In accepting that receipt the Bank was not misled by any act or omission on the part of Schenley or of any one acting on its behalf.

Between June 17, 1947, and September 16, 1948, Hedgeside pledged to the Bank as security for loans to Hedgeside its warehouse receipts purporting to cover the said 2,859 barrels of whisky, described in subsection (c), *supra*. This whisky had been produced by Franciscan and sold by it to Barnhill as produced. The numbers and the dates of issue of the warehouse receipts pledged by Hedgeside to the Bank are as follows:

No.	Date of Issue	No. of Barrels
3469-B	6-17-47	225
3470-B	6-17-47	735
3472-B	7-30-47	100
3474-B	9-10-47	100
3475-B	9-16-47	200
3476-B	9-16-47	200
3477-B	10-22-47	200
3548-B	12-17-47	200
3552-B	9-16-48	899

2,859

As set out in subsection (c), supra, at the time of the above purported pledges to the Bank, Schenley or Schenley's predecessors in title were the holders of valid warehouse receipts covering the said 2,859 barrels of whisky, then stored in No. 2, the last receipt for said whisky having been issued to Barnhill more than four months before the first warehouse receipt for the same whisky was pledged to the Bank.

Schenley, or Schenley's predecessors in title—Heaven Hill and Barnhill—at all times since the delivery to them of their warehouse receipts covering the whisky, retained all the indicia of ownership of the liquor, and Hedgeside was at no time clothed with the apparent ownership of that property but held only the naked possession thereof as a bonded warehouseman. The warehouse receipts listed above held by the Bank were issued and pledged by Hedgeside to the Bank without the knowledge, authority, or consent of Franciscan, the original producer of the whisky, and without the knowledge, authority, or consent of the said subsequent purchasers of the liquor and holders of valid warehouse receipts therefor—Barnhill, Heaven Hill, and Schenley. In accepting its said warehouse receipts from Hedgeside, the Bank relied solely upon the mere possession of the whisky by Hedgeside as proprietor of a Government bonded warehouse. In accepting its warehouse receipts, the Bank was not misled or deceived by any act or omission on the part of Schenley or its predecessors in title—Barnhill, Heaven Hill, and

Franciscan—nor did it suffer detriment because of any act or omission of theirs.

At all times herein mentioned, up to the date of the filing of the involuntary petition in bankruptcy, Hedgeside's No. 2 held a permit to operate that warehouse duly issued by the United States, Alcohol Tax Unit Form 27-D, and at all of said times it held a "Distilled Spirits Manufacturer's License" and a "Public Warehouse" license, duly issued by the Board of Equalization of California. Hedgeside did not advertise for or solicit customers for the storing of spirits and whisky, and did not regularly store goods for the public generally, but in the regular course of its business Hedgeside stored in bond whisky and spirits produced in its own distillery, and whisky and spirits owned by a limited number of persons licensed to deal in bulk whisky and spirits, with whom Hedgeside did business. Hedgeside charged a reasonable rate in the regular course of business for such storage.

The principal place of business of Hedgeside and its No. 2, at all times herein mentioned, was at Napa, and at all of the said times copies of warehouse receipts issued by Hedgeside covering whisky and spirits stored in bond at No. 2 were kept at the said principal place of business and at the said warehouse.

At all times herein mentioned and during the year 1948, the Bank was not a creditor of Franciscan.

The Referee's conclusions of law were:

Schenley was and is a bona fide purchaser of the 8,933 barrels of whisky and spirits.

At the time Hedgeside pledged to the Bank the duplicate warehouse receipts for the 574 barrels of spirits, Hedgeside was not the owner of the spirits, nor did it have any right, title, or interest in them except as Schenley's bailee, Schenley being the owner of the spirits and the holder of valid warehouse receipts for them. The Bank has no interest whatsoever in the 574 barrels.

Hedgeside was at no time the owner of the 2,759 barrels of whisky, nor did it have any right to the whisky except as bailee; and Hedgeside's pledge to the Bank of duplicate receipts for the liquor carried no interest in it to the Bank. Prior to that pledge, the whisky, consisting of 2,859 barrels, had been sold by Franciscan, the producer and original owner, to Barnhill, which thereby became the owner of the whisky and which passed good title thereto to Heaven Hill, Schenley's predecessor in title. The Bank has no interest in any of the 8,933 barrels of whisky and spirits.

When alcoholic products manufactured by Franciscan were transferred into storage in Hedgeside's No. 2, concurrently with their sale, there was an immediate delivery and an actual and continued change of possession, within the meaning of Section 3440. (The Referee thrice erroneously cites the Code of Civil Procedure instead of the Civil Code.)

At all times prior to the filing of the bankruptcy petition, Hedgeside was a warehouseman as defined in the California Uniform Warehouse Receipts Act, and at all times was lawfully engaged in the business of storing goods for profit. Hedgeside was au-

thorized to and did issue valid warehouse receipts for goods so stored, including the receipts now held by Schenley for the 8,933 barrels. Hedgeside was not a "public utility" under the Public Utilities Act of California.

When Hedgeside issued its receipts as bailee for the 8,933 barrels stored in No. 2, the California Uniform Warehouse Receipts Act was the exclusive statute governing the transfer of title to that merchandise and the ownership thereof, for all purposes, and Section 3440 had and has no application thereto.

Hedgeside and Franciscan were the lawful proprietors of United States Bonded Warehouses No. 2 and No. 111, respectively. The transfer of all or part of the 8,933 barrels subjected the alcoholic products to the Internal Revenue Code of the United States and to the regulations promulgated thereunder; and said transfers concurrently with the sale of said products were accompanied by an immediate delivery and an actual and continued change of possession within the meaning of Section 3440.

When Hedgeside issued its warehouse receipts to Schenley for the 8,933 barrels, Hedgeside recognized and confirmed the conveyance to Schenley by the making of the storage contract contained in the receipts. As bailee for Schenley, Hedgeside was and is estopped from disputing Schenley's title as against Hedgeside.

Hedgeside, its estate, and the Trustee in Bankruptcy, have no right, title, or interest, either legal or equitable, in the 8,933 barrels or any part thereof.

Schenley is the exclusive owner of the barrels and is entitled to the immediate possession thereof.

The Referee ordered that Schenley's reclamation petition be granted, and the Trustee was directed to deliver forthwith the 8,933 barrels to Schenley.

6. The Petition for Review

On February 19, 1952, the Trustee and the Bank filed a Petition for Review of the Referee's Order. While the Petition ostensibly specifies a number of alleged errors in the Referee's "findings of fact", most of the so-called "findings" objected to are in reality conclusions of law. For example, the very first objection is directed to the Referee's finding that Schenley holds "warehouse receipts" for the 8,933 barrels of whisky and grain spirits. That finding is attacked on the ground that the purported "warehouse receipts" are not valid "since none of said documents were issued by a 'warehouseman' as defined by the applicable laws of the State of California, a requirement in order to avoid Section 3440 of the Civil Code". Since in the very same sentence the Trustee and the Bank admit that Schenley does in fact hold "documents purported on their face to be 'warehouse receipts' * * *", it is clear that the objection involves simply a question of law; i.e., are the admittedly-held documents valid?

Be that as it may, the Trustee and the Bank themselves in their briefs not only admit but insist that there are no conflicts in the evidence to be resolved by this Court. The very first words of their main brief are: "There is no dispute as to the material

facts involved in this proceeding, * * *"; and the very first sentences of their closing brief are:

"At the outset we wish to make clear to the Court the fact that though there were many days of trial and therefore a long reporter's transcript there are no disputed facts, i.e., the Referee was not called upon to weigh and resolve conflicting evidence. The Referee arrived at the result he did by drawing conclusions of law from uncontradicted facts which we contend in our petition here were clearly erroneous and contrary to the established law of California. At the oral argument this Court requested each side to point out any facts disputed. We know of none * * *"

This Court is inclined to agree with the Trustee and the Bank that there are no substantial issues of fact presented to it for determination.

That being the case, the only questions presented here are those of law. In such a situation, it is familiar doctrine that a reviewing court must exercise its independent judgment. "The presumption of correctness of the referee's findings is not extended by General Order XLVII (see 11 USCA foll. section 53) to his conclusions of law." 8 Remington on Bankruptcy, 5th ed., section 3719, page 38. See also *Weisstein Bros. and Survol v Laugharn*, 9 Circ., 84 F 2d 419, 420 (1936).

7. The Questions Presented

On March 6, 1952, the Referee, in conformity with the provisions of 11 USCA section 67(a)(8), filed his Certificate on the Petition for Review. The

“Statement of Questions Presented”, which forms part of the Certificate, reads in part as follows:

“The order being reviewed states that Stanley * * * is the owner and entitled to the immediate possession of 8,933 barrels of whiskey and grain spirits that were in the possession of the * * * bankrupt as of the date of bankruptcy. Schenley * * * holds documents purporting on their face to be warehouse receipts covering all of the property sought to be reclaimed. The Trustee in Bankruptcy contends that the transfer of said property to Schenley * * * is invalid as to creditors of said bankrupt, since the reclamation petitioner failed to take possession of said property as required by Section 3440 * * * The Trustee * * * also contends that the documents designated ‘warehouse receipts’ are insufficient in law to avoid the effect of said Section 3440, claiming that the issuer of said receipts was not a ‘warehouseman’ as defined by the Uniform Warehouse Receipts Act and the applicable California statutes, and, therefore, not within the exception of Section 3440.5 of said Civil Code. The * * * Bank * * * has set up a claim of title in itself as to a portion of said whiskey and spirits, due to a pledge made to it by the bankrupt and based on duplicate warehouse receipts.”

Since diverse principles of law are applicable to the various lots of whiskey and grain spirits that figure in this litigation, the different groups into which the 8,933 barrels of alcoholic products are

divided will be considered separately.

The rights of the Bank, if any, will first be discussed.

8. Schenley's Title to the 574 Barrels of Spirits is Superior to That of the Bank

As we have seen, on January 4, 1949, Hedgeside pledged to the Bank as security for a loan its warehouse receipt purporting to cover 574 barrels of the 3,191 barrels of grain spirits hereinbefore described. These 574 barrels had already been purchased by Schenley from Hedgeside between November 24, 1947, and December 15, 1947, according to Schenley's warehouse receipts. In other words, Hedgeside had nothing to pledge, so far as those barrels were concerned, when it delivered its purported "warehouse receipt" of January 5, 1949, to the Bank. The Bank admits that Schenley's warehouse receipts are prior in point of time.

It is well settled that the rule that an assignee acquires no better title than his assignor applies to a sale of non-negotiable warehouse receipts. In *San Angelo Wine & Spirits Corporation vs. South End Warehouse Company*, 19 C.A. (2d) (Supp) 749, 758 (1936), it was said:

"In the case before us the plaintiff received an assignment of a nonnegotiable warehouse receipt, which expressly set forth that the warehouseman claimed a lien for all lawful claims for money advanced as well as for charges and outlays of the kinds enumerated in section 27 of the Uniform Warehouse Receipts Act. The

plaintiff, as assignee of Western Distillers Corporation, had no stronger right than that company itself; * * *”

Furthermore, the Referee found that the Bank acted “as collection agent for Hedgeside” in delivering the warehouse receipts to Schenley in exchange for the payment of the Hedgeside drafts. Thus the Bank had actual knowledge of the delivery to Schenley of the receipts covering the 574 barrels in question. Miss Elouise Jones, assistant to the supervisor of Schenley’s “cashier, contract, and lease departments”, gave detailed testimony regarding the manner in which she took the money to the Bank and picked up the warehouse receipts, the paid sight drafts, and the original invoices.

In their Petition for Review, however, the Trustee and the Bank strenuously object to the Referee’s Finding that the Bank had actual knowledge of the Bank’s delivery of the warehouse receipts to Schenley. They contend that “a bank, in functioning as a lending agent, is not charged with notice of matter coming to the attention of an employee in the collection department, where there was no obligation or duty on said employee to transmit such notice to a proper officer or managing agent of the bank”.

This precise argument, which happens to have been made by another national bank in this State in at least two cases during the last fifteen years, has been vigorously repudiated by the Supreme Court of California. In *Sanders vs. Magill*, 9 C. (2d) 145, 153-154 (1937), the Court said:

“Knowledge of an officer of a corporation within the scope of his duties is imputable to the corporation. (Many cases cited.) Appellant (bank) admits that the law is correctly stated in these authorities, and that certain of its officers knew at the time of the sale of said note that the water stock was pledged for the payment of the balance due on said promissory note and that it had never been sold to satisfy said balance or any part thereof. It contends, however, that while certain officers had this information, the officers or agents who negotiated the sale of said note to Magill had no such information, and that they dealt with Magill without any notice of the true status of said water stock * * * Appellant’s counsel concede that they have found no authority which supports this contention, but nevertheless assert that the position of appellant in this respect is both sound and reasonable. We are not inclined to agree with this statement. It is diametrically opposed to the well-established rule of law above stated that notice to the agent or officer of a corporation is imputable to the corporation itself. Furthermore, such a rule, in our opinion, is fraught with danger and would open up avenues of fraud which would lead to incalculable hazards. It would permit a corporation, by not letting its right hand know what is in its left hand, to mislead and deceive those who are dealing with it in perfectly good faith. We are

not prepared at this time to pioneer in this field of jurisprudence.” (Emphasis supplied.)

See also *Vanciel vs. Kumle*, 26 C. 2d 732, 734 (1945).

9. The “Heaven Hill” Whiskey

One of the most troublesome groups of merchandise to be here considered is the one comprising the 2,759 barrels of whiskey purchased by Schenley from Heaven Hill. As the Bank and the Trustee themselves trace the chain of Schenley’s title, “The whiskey so purchased (from Heaven Hill) was produced by Franciscan, then sold by it to Barnhill * * * which in turn sold to Heaven Hill, the predecessor in interest of Schenley”. The intricate details of Schenley’s and the Bank’s conflicting claims have already been fully set forth in the summary of the Referee’s findings, *supra*.

It will be remembered that the last receipt for the whisky was issued to Barnhill in January, 1947, more than four months before the first warehouse receipt for the same liquor was pledged to the Bank by Hedgeside, which at no time owned the whisky in question.

As the Bank points out, “this attempted disposition of the same goods to two different persons (sic) was the result of the actions of one Richard I. Stone, president and general manager of Hedgeside and Franciscan. Said Stone is now serving a sentence for theft in San Quentin.”

In the case of *In re Harbor Stores Corporation*,

DC N.Y., 29 F. Supp. 749, 751 (1939), the Court said:

“It is undisputed that the warehouse receipts originally given to the Trust Company were fraudulently issued by the Insular Corporation. They stood for no actual deposits of cocoa beans in the warehouse by any of the Garcia companies or by the Trust Company but were mere duplicating receipts purporting to cover property clearly shown to belong to others. These fraudulent receipts were complete nullities as against the real owners of the goods. (Cases cited.) And their subsequent exchange for warehouse receipts of the bankrupt in no way changed their character. (Case cited.) * * * * Neither is there any basis for an estoppel against the real owners of the property. (Case cited.) Nor is the good faith of the Trust Company at all material.” (Emphasis supplied.)

Nor did the issuance of the credit memorandum from Franciscan to Barnhill, reducing the original purchase price, *supra*, affect Barnhill's title to the whisky. There is no merit to the Bank's contention that “Since Barnhill never actually paid the contracted price, it never received title, and it consequently was unable to pass title to Heaven Hill, or Heaven Hill to pass title to Schenley”.

The Referee found that after the original purchase price was paid, as a result of a compromise the figure was reduced and a credit memorandum was issued by Franciscan to Barnhill. When the

seller makes a partial refund, a different legal situation is created from that which is present when the seller has not been paid at all.

Furthermore, unless the contract so specifies, payment does not affect the passage of title. Section 1739 of the Civil Code of California reads in part as follows:

“Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

“Rule 1. (Goods in deliverable state.) Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

* * * * *

“Rule 4. (Appropriation of unascertained goods.) (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied and may be given either before or after the appropriation is made.”

See also *Otis vs. Overland Terminal Warehouse*

Company, 18 C.A. (2d) 157, 161 (1936), hearing denied by the Supreme Court of California (1937).

Similarly, where there is a sale by invoice, draft, and warehouse receipts, title passes when there is "an acceptance and payment of the draft". *Henderson vs. E. Lauer & Sons*, 40 Cal. App. 696, 698 (1919); *Alonso vs. Badger*, 58 C.A. 2d 752, 758 (1943), hearing denied by the State Supreme Court (1943).

With particular reference to warehouse receipts, we find the rule thus stated in 55 A.L.R. 1116:

"As in case of a bill of lading, a warehouse receipt is, in ordinary commercial transactions, regarded as the symbolical representation of the property, and its transfer and delivery are upheld as a valid transfer of the legal title to the property represented thereby."

The Bank insists that because of the "proven ability" of Glaser "to force the price downwards by making claims against Stone, no sums sent Franciscan by Barnhill can be regarded as turned over for Franciscan's unfettered control." If we give the maximum weight to this argument—which, as has been stated, this Court does not consider valid—the Bank's position is not improved. Barnhill's title, at the very worst, was only voidable by Franciscan because of Glaser's insistence that Franciscan grant it a credit.

But Franciscan made no effort to avoid the sale to Barnhill before the latter sold the whisky to Heaven Hill. Therefore, even according to the

Bank's theory, Barnhill and its successors in interest acquired a good title.

Section 1744 of the California Civil Code reads as follows:

“Sale by one having a voidable title. Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.”

See also *Keegan vs. Kaufman Bros.*, 68 C.A. 2d 197, 202 (1945).

The Bank complains that “during the period that Stone was borrowing from the Bank by pledging the warehouse receipts now held by the Bank and covering the Heaven Hill whiskey, Marcus Glaser, president of Barnhill, knew that Stone had been borrowing through Hedgeside representing that Hedgeside owned Franciscan-produced liquor.” It is further urged that “Nothing was done by Marcus Glaser or Franciscan other than to bill Hedgeside in order to protect Glaser, and despite Marcus Glaser's knowledge of Stone's fraud in this connection, Marcus Glaser neither notified the Bank nor acted to replace the Franciscan management,” etc.

As we have seen, however, the Referee specifically found that the warehouse receipts held by the Bank were pledged by Hedgeside without the knowledge of Franciscan or the successive purchasers of the whisky—Barnhill, Heaven Hill, and Schenley; that the Bank, in accepting the receipts from Hedgeside,

relied solely on the mere possession of the whisky by Hedgeside as proprietor of a Government bonded warehouse; and that in accepting the receipts, the Bank "was not misled or deceived by and did not suffer detriment because of any act or omission on the part of (Schenley) or of (Schenley's) predecessors in title, Barnhill * * *, Heaven Hill * * *, and Franciscan * * *."

The above is a finding of fact; and both the Bank and the Trustee have told us emphatically that "there are no disputed facts".

To labor the question of Schenley's blamelessness in the matter of Hedgeside's pledge to the Bank would therefore be a work of supererogation.

10. The Mountain View Spirits

In 1947-1948, Schenley purchased from Franciscan 900 barrels of grain spirits produced at Mountain View. These barrels were first stored at No. 111, but in the latter part of 1948 were transferred in bond to No. 2.

Both the Bank and the Trustee attack this sale on the ground, *inter alia*, that the postponement in the transfer from No. 111 to No. 2 makes the transaction invalid, by virtue of Section 3440. At present, however, there is being considered only the Bank's status as creditor, to give it standing to make such a claim.

The pertinent part of the section follows:

"Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon,

other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer; * * *."

Section 3340.5 of the Civil Code is as follows:

"Section 3440 of this code shall not apply to goods in a warehouse where a warehouse receipt has been issued therefor by a warehouseman as defined in the Warehouse Receipts Act, and a copy of such receipt is kept at the principal place of business of the warehouseman and at the warehouse in which said goods are stored. Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt."

Aside from the point that a transfer into bond is a sufficient change of possession, which will be discussed *infra*, it may be observed that only a creditor of Franciscan during the period between December, 1947, and December, 1948—when Fran-

ciscan was in possession of the spirits—could, under Section 3440, challenge the sale to Schenley. The only evidence put in by the Bank on this phase of the case is to the effect that as of the time of the trial, October, 1950, Franciscan owed the Bank \$3,929.54. That is a far cry from Franciscan's position as debtor "while * * * in possession" of the spirits.

To establish itself as Franciscan's creditor, however, the Bank invokes the provision of Section 3439.01 of the Civil Code, which reads in part as follows:

"'Creditor' is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

The Bank puts forth four elaborate theories under which it contends it has a "contingent" claim against Franciscan "running back as early as 1948". This claim, it is argued, is sufficient to give the Bank the status of "creditor" within the ambit of Section 3439.01, *supra*.

The Bank's finespun and farfetched reasoning can best be expressed in its own words:

"* * * Stone, by virtue of the pre-incorporation agreement and the manner in which the other directors permitted him to operate Franciscan, was enabled to finance Franciscan as he chose. Commencing in 1946 Stone followed a practice of using Hedgeside as a conduit for Franciscan's borrowing. In other words, Stone ostensibly borrowed for Hedgeside, but actually

gave the money to Franciscan. Similarly, Stone represented to the Bank that Hedgeside owned the security pledged, whereas actually Franciscan owned the security. Marcus Glaser knew of this practice as early as July, 1947. Nevertheless, the only action taken was to ratify Stone's conduct by memorandum billing by Franciscan against Hedgeside (in order to protect Glaser). The effect of this course of conduct was to make Franciscan liable to the Bank on the notes executed with respect to the so-called 'Heaven Hill purchase' as an undisclosed principal."

Out of this statement of fact, the Bank spins four "causes of action", based upon (a) contract, (b) deceit, (c) negligence, and (d) constructive trust. In connection with the theory of "negligence", the Bank tells us that it is asserting Franciscan's "own" negligence, "not any theory of respondeat superior". As to the constructive trust, the Bank says:

"The books and records of Franciscan show that large sums were received by Hedgeside during the period that Hedgeside was the ostensible borrower from the Bank in connection with warehouse receipts now held by the Bank. A fair inference may be drawn from the evidence that the money Hedgeside turned over to Franciscan came from the Bank, which makes Franciscan a constructive trustee for the Bank for sums so received."

It is difficult to see how these collateral and complicated "causes of action" against Franciscan can

spell out a creditor-debtor relation between the Bank and Franciscan to the prejudice of Schenley, which in good faith paid for the spirits in question and received warehouse receipts therefor.

The Referee found as a fact that "during the year 1948 Anglo Bank was not a creditor of Franciscan * * *" This Court believes that finding to be correct.

11. The Alter Ego Arguments

Next, let us examine the claims of the Trustee.

To attack Franciscan's sales to Schenley by invoking Section 3440, the Trustee must establish himself as a creditor of Franciscan. It is insisted that, unlike the Bank, the Trustee bottoms his claim to a status of creditor of Franciscan upon "the alter-ego relationship between Hedgeside and Franciscan". The Trustee further maintains that "'alter-ego' applies solely to the question of whether or not the Trustee has creditor status; it has nothing whatsoever to do with the entirely separate and distinct problem of whether or not a change of possession from Franciscan to Hedgeside satisfied Section 3440, which is solely a question of statutory construction".

This Court believes that the Trustee is here endeavoring to make a doctrinaire distinction between tweedledum and tweedledee. In any event, the Trustee's position will not be prejudiced if the two theories are considered together.

It is contended that "for all practical purposes the two corporations were merely separate names

for the one business enterprise of their common president", Stone.

There were purchased by Schenley from Franciscan or its successors in title a total of 4,118 barrels of whisky and grain spirits, as follows:

(1) The Heaven Hill whisky, consisting of 2,759 barrels; chain of title: Franciscan to Barnhill to Heaven Hill to Schenley.

(2) Grain spirits, 459 barrels, purchased by Schenley from Franciscan via Stone.

(3) Grain spirits, 900 barrels, purchased by Schenley direct from Franciscan.

Of these three lots of merchandise, only No. 3 was not immediately stored in Warehouse No. 2. This third lot of 900 barrels was warehoused in No. 111 from various dates between December, 1947, and April, 1948, until November and December, 1948, when it was transferred in bond to No. 2.

Schenley objects that the "alter ego" argument constitutes an "affirmative defense" and therefore should have been specifically pleaded. In the Court's view of the case, however, it is not necessary to consider this highly technical contention, since the rights of the parties can be determined on a far sounder basis.

It may be assumed, then, for the sake of the argument, that the Trustee is in a pleading position to urge the alter ego theory.

It is well settled in California and elsewhere that "before the acts and obligations of a corporation may be recognized as those of a particular person under the alter ego doctrine, it must be shown that

an adherence to the corporate entity under the particular circumstances would sanction a fraud or promote injustice". *Wiseman vs. Sierra Highland Mining Company*, 17 C. (2d) 690, 698 (1941).

The correct and salutary rule was thus succinctly stated in the case of *In re New York Title & Mortgage Co.*, 14 N.Y.S. 2d 570, 571 (1939), unanimously affirmed, 17 N.Y.S. 2d 224 (1939), appeal denied, 282 N.Y. 810, 27 N.E. 2d 819 (1940):

"The corporate veil may at times be pierced to do equity and justice, but never to accomplish the reverse."⁴

Schenley bought and paid for the merchandise in question. A finespun theory of alter ego should not deprive it of its purchase.

12. The Trustee, as the Representative of Hedge-side, Cannot Attack the Delayed Transfer of the 900 Mountain View Barrels.

There has already been discussed the Bank's attack upon Schenley's purchase of the 900 barrels of

⁴ See also *Hollywood Cleaning & Pressing Co.*, 217 Cal. 124, 130 (1932); *Dos Pueblos Ranch & Improvement Company v Ellis*, 8 C. (2d) 617, 621 (1937); *Schmitt v Northern Counties Land and Cattle Company*, 108 Cal. App. 688, 691 (1930); *Davis v Perry*, 120 Cal App 670, 674-675 (1932); *Estate of Greenwald*, 19 C. A. (2d) 291, 295 (1937), hearing denied by the State Supreme Court (1937); *Loughran v Reynolds*, 53C.A. (2d) 250, 252-253 (1942) petition for hearing by the State Supreme Court denied (1942); *Campbell v Birch*, 53 C.A. (2d) 399,406 (1942), petition for a hearing by the State Supreme Court denied (1942); *Spear v H. V. Greene*, Mass., 140 N. E. 795, 798 (1923); *In re Lawyers Mortgage Co.*, 15 N.Y.S. 2d 239, 244 (1939).

grain spirits produced at Mountain View. That attack was based upon the ground, inter alia, that the postponement in the transfer from No. 111 to No. 2 makes the transaction invalid.

Next to be considered is the Trustee's assault upon the same purchase, as a representative of Hedgeside, which is a creditor of Franciscan.

Under 11 USCA Section 110(e), the Trustee may avoid any transfer by the bankrupt which any creditor of the bankrupt might have avoided. In this instance, however, the "creditor" is not a creditor of the bankrupt, but the bankrupt itself.

But, as the Trustee points out, the Trustee represents not only the bankrupt's creditors, but the bankrupt itself. It is in this latter capacity that the Trustee seeks to avoid the sale of the 900 barrels of spirits by Franciscan to Schenley.

The Referee concluded, as a matter of law, that Hedgeside, when it "issued its warehouse receipts for all or part of the said 8,933 barrels of whiskey and spirits, * * * recognized the conveyance to (Schenley) of said goods and confirmed said conveyance by the making of the storage contract contained in said warehouse receipts, and Hedgeside as bailee for (Schenley) was and is estopped from disputing (Schenley's) title to said goods as against Hedgeside".

Although the Trustee and the Bank, in their petition for review filed in this Court, vigorously attack most of the conclusions of law announced by the Referee, they leave unassailed the one dealing with Hedgeside's estoppel as bailee.

From this somewhat conspicuous hiatus, Schenley argues, probably correctly, that the Trustee has abandoned the point. Nevertheless, for the sake of completeness, this Court will consider it briefly.

As we have seen, the 900 barrels were transferred from Franciscan's No. 111 to Hedgeside No. 2 in November and December, 1948. At that time, according to the Referee's Findings, "the warehouse receipts for said barrels now held by (Schenley) were issued to (Schenley) by Hedgeside".

In December, 1948, then, Hedgeside became Schenley's bailee for the barrels in question. It is hornbook law that, as such bailee, Hedgeside cannot dispute Schenley's title to the spirits.

In 56 Am. Jur., Warehouses, section 27, pages 333-334, the rule is thus stated:

"In accordance with the well-settled general rule that a bailee is estopped to deny his bailor's title, a warehouseman with whom goods have been deposited is estopped, in the absence of the intervention of a paramount title, from disputing the title of the depositor. Under this doctrine, a warehouseman may not set up a title another does not assert, for the purpose of appropriating the stored goods to his own use."

See also 6 Am. Jur., Bailments, section 96 et seq., page 245 et seq.

The same doctrine has been embodied in the Warehouse Receipts Act of California, Act No. 9059, Deering's California General Laws, vol. 3, p. 3419. Section 16 reads as follows:

"Title of warehouseman. No title or right

to the possession of the goods, on the part of the warehouseman, unless such title or right is derived directly or indirectly from a transfer made by the depositor at the time of or subsequent to the deposit for storage, or from the warehouseman's lien, shall excuse the warehouseman from liability for refusing to deliver the goods according to the terms of the receipt."

In 12 Cal. Jur., *Fraudulent Conveyances*, section 22, page 980, it is said:

"A creditor may waive his right to avoid a fraudulent conveyance. Likewise his conduct may raise an estoppel as to him. Consequently, where the creditor recognizes the conveyance or makes any statement or agreement confirming it, upon the faith of which the grantee acts as he would not otherwise—such as expending money on the property—the creditor will be estopped to deny the validity of the conveyance." (Emphasis supplied.)

Since Hedgeside would have been estopped from questioning Schenley's title, the Trustee, as a representative of Hedgeside, is likewise estopped from doing so. In 4 Remington on Bankruptcy, 5th ed., section 1412, page 100, the rule is thus stated:

"The Trustee takes title to all property which passes to him by operation of law under subdivision (a), section 70, 11 USCA, section 110, subject to all equities existing against the bankrupt at the time of the filing of the petition. He gets no more and no less than the bankrupt was

entitled to at the time of the filing of the petition. It has been said that he stands in the shoes of the bankrupt.”

For the above reasons, the Trustee is not in a position to attack the delayed transfer of the 900 barrels of Mountain View grain spirits from No. 111 to No. 2.

13. “The Real Basic Issue”

Although the parties have filed with the Referee and with this Court briefs dealing with many legal aspects of this case, and aggregating 263 pages in length, the Trustee and the Bank, in their closing memorandum, solemnly assert:

“The real basic issue in this case is whether or not Schenley’s failure to transfer possession of the barrels of whiskey and spirits purchased rendered the transactions void under Section 3440. This issue is involved in the case of each of the 8,933 barrels.”

While this seems to be something of an oversimplification, it is undoubtedly true that the most important problem in this complicated litigation is the impact, if any, of that oft-invoked section upon the ultimate rights of the parties. Indeed, it is only by etching out the ancillary matters just discussed that one can bring out Section 3440 into proper relief.

(a) Section 3440 No Longer Governs in a Case of This Type.

The Court of Appeals for this Circuit has held that the California Warehouse Receipts Act, *supra*,

has repealed Section 3440 insofar as it might otherwise apply to warehoused goods. This ruling of our Appellate Court is found in the case of *Heffron vs. Bank of America National Trust and Savings Association*, 9 Cir., 113 F. 2d 239, 242-243 (1940), 133 ALR 203. In that case, the court said:

“Indeed, the general scheme of the Warehouse Receipts Act to achieve uniformity, and to effect the secure and ready use of warehouse receipts as instruments of credit, is inconsistent with the notion that the business world must look to something other than the observance of the definite and comprehensive terms of the act itself. Compare *Jewett vs. City Transfer & Storage Co.*, 128 Cal. App. 556, 18 P. 2d 351.

“We conclude that the Warehouse Receipts Act repealed section 3440 so far as the latter might otherwise apply to warehoused goods.

“The enactment in 1939 of section 3440.5 of the Civil Code may fairly be considered as a move to clarify existing law or to remove doubts of the nature prompting the present litigation.”

Our Court of Appeals has steadfastly adhered to the doctrine announced in the *Heffron* case, *supra*. In *Sampsell vs. Lawrence Warehouse Co.* 9 Cir., 167 F. 2d 885, 886 (1948), certiorari denied, 335 U.S. 820-821 (1948), the Court quoted from the *Heffron* decision with approval, and also gave an extensive excerpt from *Commercial National Bank of New Orleans vs. Canal-Louisiana Bank & Trust Company*, 239 U.S. 520, 528-529 (1916). In that case the Supreme Court said:

“It is apparent that if these uniform acts are construed in the several states adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity, and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws.”⁵

(b) Hedgeside Stored Goods “For Profit”.

It is necessary, therefore, to consider the rights of the parties in the light of the California Warehouse Receipts Act. For a proper appraisal of those rights, however, we must first glance at some Federal statutory provisions governing distilleries.

The products of a distillery, when “removed from the place where they were distilled and not deposited in bonded warehouse as required by law” are subject to a tax amounting to several times their value and collectible “immediately”. 26 USCA Section 2800 (b)(2). Many distillers operate an Internal Revenue Bonded Warehouse, where the merchandise can be stored for eight years without payment of a tax. See 26 USCA Sections 2872 and 2879 (b).

⁵ See also *Barry v Lawrence Warehouse Co.*, 9 Cir., 190 F 2d 433, 437-438 (1951); *Bradley v St. Louis Terminal Warehouse Company*, 8 Cir., 189 F 2d 818, 823 (1951); *Jewett v The City Transfer & Storage Co.*, 128 C. A. 556, 562 (1933), hearing denied by the State Supreme Court (1933); *Sampsell v Security-First Nat'l. Bank of L. A.*, 92 C. A. 2d 648, 651-652 (1949), petition for a hearing denied by the State Supreme Court (1949); 67 C. J. 448, *Warehousemen and Safe Depositaries*, section 8.

As we have seen, the Referee found that in the regular course of its business Hedgeside stored in bond whisky and spirits produced in its own distillery, and whisky and spirits owned by a limited number of persons with whom Hedgeside did business. Hedgeside charged a reasonable rate for such storage. Copies of its warehouse receipts were kept at Hedgeside's principal place of business and at its Warehouse, referred to herein as No. 2, both at Napa.

Furthermore, the Referee found as a fact that Hedgeside held State and Federal permits and licenses to engage in business as a bonded warehouse, to manufacture distilled spirits, and to conduct a "public warehouse".

Under these Findings, Hedgeside was a warehouseman under the Uniform Warehouse Receipts Act, according to Schenley's argument. The Trustee and the Bank deny this, attacking Hedgeside's status as a warehouseman on two grounds.

Section 58 of the Warehouse Receipts Act of California, *supra*, defines "Warehouseman" as "a person lawfully engaged in the business of storing goods for profit".

The record shows that Hedgeside charged 10 cents per barrel per month for storage. In addition, there was a 25-cent "handling charge" for taking each barrel "off of a truck or other conveyance that brought it there, taking it into the warehouse," etc. A similar 25-cent fee was collected when the barrel was taken out. There is also testimony that "when the rate of 10 cents per month" was fixed, there was

no estimate made of whether it would render a profit "on the operation".

From such a showing, it is argued that Hedgeside was not a "warehouseman" as defined by California statute, since it "was not engaged in the business of storing for profit".

In support of his position, the Trustee cites two California decisions involving facts far different from those before this Court, and containing language inferentially adverse to the Trustee's contention.

One case is that of *Sinsheimer vs. Whitely*, 111 Cal. 378, 380 (1896), decided long before the passage of the California Warehouse Receipts Act. There no storage whatever was charged. In the course of its opinion, however, the Court used the following language:

"A warehouse receipt has been defined to be a written contract between the owner of the goods and the warehouseman, the latter to store the goods and the former to pay for that service. (*Hale vs. Milwaukee Dock Co.*, 29 Wis. 488; 9 Am. Rep. 603) * * * But it is said that the tickets were the only vouchers issued by the defendant company, and hence must be treated as warehouse receipts. Rather, it seems to us, that circumstance tends to show that said company was not a warehouseman at all in the sense which the law attributes to that term—an inference corroborated by the fact that it makes no charge for storage. It is only persons

who pursue the calling of warehouseman—that is, receive and store goods in a warehouse as a business for profit—that have power to issue a technical warehouse receipt, the transfer of which is a good delivery of the goods represented by it. (Shepardson vs. Cary, 29 Wis. 42; Bucher vs. Commonwealth, 103 Pa. St. 534; Edwards on Bailments, sec. 332)”. (Emphasis supplied.)

From the foregoing, it will be seen that the expressions “to pay for that service”, “charge for storage”, and “for profit” are used interchangeably.

The other case, Harry Hall & Co. vs. Consolidated Packing Company, 55 C.A. 2d 651, 654 (1942), likewise was one in which no storage was charged. As to the point now under discussion, the Court merely said, citing the Sinsheimer case, *supra*:

“In the present case defendant was not a public or a private ‘warehouseman’ * * *, nor was it to receive compensation for the storage.”

It is difficult to see how the Trustee or the Bank can derive comfort from either of these California cases. They simply are not in point.

In *Fidelity & Deposit Co. vs. State of Montana*, 9 Cir., 92 F. 2d 693, 696 (1937), the Court said:

“That Chatterton & Son was a public warehouseman within the general meaning of the term is not questioned. A storage and handling charge was regularly exacted from all those

using the warehouse facilities and negotiable warehouse receipts were uniformly issued. 67 C.J. 443.”

Section 57 of the Warehouse Receipts Act—a section that seems to have escaped the notice of counsel—provides:

“Interpretation of act. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.”⁶

Since the “law of those states which enact it” includes not only state statutes but also judicial decisions interpreting those statutes, the opinions of state judges in other commonwealths will be helpful here.

In *New Jersey Title Guarantee & Trust Co. vs. Rector*, 75 A. 931, 932-933 (1910), the New Jersey Court of Errors and Appeals—the highest in the State—construed this identical Section 58 as follows:

“Section 58 declares ‘warehouseman’ to mean a person lawfully engaged in the business of storing goods for profit, and the bill of complaint alleges that the complainant is conducting the business of running safe deposit vaults, and warehousing valuable goods and chattels for hire, which sufficiently describes ‘warehouseman’ as defined by the act, * * *” (Emphasis supplied)

⁶ See also the cases referred to in Subsection (a) of Section 13 of this opinion.

The Uniform Warehouse Receipts Law was construed by the same Court in *New Jersey Manufacturer's Association Fire Insurance Company vs. Galowitz*, 150 A. 408, 409 (1930). There the Court remarked:

“The legal concept of the action comes within the general subject of bailee for hire. The automobiles were stored at a price in defendant's garage. The principle of liability is that of a warehouseman.” (Emphasis supplied)

In *E. V. Webb & Co. vs. Friedberg*, N.C., 126 S.E. 508, 509 (1925), the Supreme Court of North Carolina implied that the mere fact that a receipt gives the “storage rates” indicates that the goods are stored “for profit”. The Court said:

“If the concern is engaged in the business and goods are stored for profit, the statute applies. It matters not if the concern stores its own and also the goods of others (as was done by Hedgeside). The receipt issued terms itself ‘warehouse receipt’ and shows on the face that the goods are stored for profit; it gives the ‘storage rates’.”

(Emphasis supplied)

This Court holds that Hedgeside was engaged in the business of storing goods for profit, within the meaning of the California Warehouse Receipts Act.

(c) Copies of Schenley's Receipts Were Kept at No. 2, As Required By Section 3440.5.

Section 3440.5, *supra*, provides that Section 3440 shall not apply where a copy of the warehouse receipt is kept “at the principal place of business of

the warehouseman and at the warehouse in which said goods are stored". In the Heffron case, our Court of Appeals held that this section "may fairly be considered as a move to clarify existing law or to remove doubts of the nature prompting the present litigation".

The Trustee and the Bank concede that copies of all receipts that Schenley now holds were kept at Hedgeside's "principal place of business". They deny, however, that copies were kept "at the warehouse in which said goods are stored".

The Referee found as a fact that at all times copies of warehouse receipts issued by Hedgeside, covering whisky and spirits stored in No. 2, "were kept at said principal place of business" and "at said warehouse".

Hedgeside had two warehouses that made up No. 2. The Hedgeside office and the storekeeper-gauger's office were in a third building. The receipts were made out in triplicate, and the receipt books were stored in a vault in "a little extra room off of the main office". The space between the building where the office is and "where the warehouse starts" is "a truck and a half".

Apparently because the copies of the warehouse receipts were not kept in the warehouse building itself, the Trustee argues that copies were not kept "at the warehouse".

This Court is not impressed with such hairsplitting. Section 3440.5 requires that "Such copy shall be open to inspection upon written order of the owner or lawful holder of such receipt". Obviously,

a person presenting such an authorization would go to the office building—not to the warehouse structure itself, which Federal law requires shall be “kept securely locked, and shall at no time be unlocked or opened or remain open except in the presence of such storekeeper-gauger or other person who may be designated to act for him”. 26 USCA section 2872.

But perhaps “We must speak by the card, or equivocation will undo us.”

Fernald’s “Connectives of English Speech,” at page 55, has the following:

“At is less definite than in. At the church may mean in, or near the church.”

The Court holds that copies of Schenley’s warehouse receipts were kept at No. 2, as required by Section 3440.5.

14. Regardless of the Uniform Warehouse Receipts Act, Storage in A Government Bonded Warehouse Effects a Change of Possession Within the Purview of Section 3440.

Because of the Government’s tight control over distilleries, it is well settled that storage of alcoholic products in an Internal Revenue Bonded Warehouse constitutes a sufficient change of possession under the Bulk Sales Law.

Not only, as we have seen, are distilled spirits immediately subject to tax, but Section 2872, *supra*, provides for the joint custody of the proprietor of

⁷ Hamlet V i 142-143.

the warehouse and a Government officer, called the "storekeeper-gauger".

Section 2873, as modified by Reorganization Plan No. 26 of 1950, prepared by the President of the United States pursuant to the provisions of the Reorganization Act⁸ of 1949, provides that "The establishment, construction, maintenance, and supervision of internal revenue bonded warehouses shall be under such regulations" as the Secretary of the Treasury shall prescribe.

Section 2879 (a) requires that distillers of all spirits removed to an Internal Revenue Bonded Warehouse shall enter the same for deposit in such warehouse, under such regulations as the Secretary of the Treasury⁹ shall prescribe.

Section 2915 contains detailed instructions regarding the keeping of the storekeeper-gauger's warehouse book.

Referring to the Government's heavy hand upon distilleries, in *Taney vs. Penn National Bank of Reading*, 3 Cir., 187 F 689, 697, 698, 699, 700, 703 (1911), the Court said:

"The tax on whisky is remarkable and distinguished from other excise taxes, by the fact that it is in amount many times the cost of the whisky itself, the tax of \$1.25 a gallon being about five

⁸ See note under 5 USCA section 241, Cumulative Supp. (1950).

⁹ See note 8, *supra*.

times the ordinary value of the whisky at the still.¹⁰ It is manifest that this extraordinary tax could not be collected on the whisky as it comes from the still, or when it is first put in barrels, without hardship to the distiller or owner so great as to discourage its manufacture or confine such manufacture to persons or corporations of great wealth. It was necessary, or at least very desirable in the interest of the public revenue, that reasonable opportunity should be given to the distiller, to allow the product of his distillery to become marketable by the ripening process alluded to, before he was called upon to pay the tax * * *

* * * * *

..* * * the warehouse is theoretically in the joint custody of the store-keeper and proprietor, but, in fact, the control of the storekeeper is complete and practically exclusive. The lock is put on by the government and the key is in the store-keeper's possession * * *

* * * * *

..To all the world, but especially to those engaged in the business of distilling and of buying and selling whisky, it was apparent that the physical custody and control of the whisky here in question was not in the distiller and vendor, but in the revenue officers of the United States, and in neither case was the distiller capable of making physical delivery

¹⁰ Under a 1951 amendment to 26 USCA section 2800 (a) (1), the tax was \$10.50 on each proof gallon.

to his pledgee or vendee. All those doing business with these distillers, including creditors, were bound to take notice of this notorious physical fact and were put upon due inquiry, and had imposed upon them the duty of self-protection, as to the title of the goods so situated * * *

• • • • •

“The physical possession was not transferred, because it was out of the power of the vendor to transfer the same, without the payment of a tax many times the value of the goods sold, one of the very objects of the law providing for the government’s custody of the whisky presumably being that the payment of the tax might be deferred for a number of years without interfering with the right to transfer the property therein * * *

* * * * *

“As the reason for the rule making fraudulent, as against creditors, transfers of personal property, unaccompanied by actual delivery, is based upon the policy of preventing the fictitious credit permitted by allowing possession to remain in the debtor, it is pertinent to remark, in regard to a situation which, under the laws of the United States is, as we have said, *sui generis*, that, as the creditors of the Distilling Company had no access to the interior of the warehouse, they could not claim to have been misled to their injury. They cannot be deemed to have given credit upon the faith of whisky in a warehouse of which they had no means of ascertaining the contents.”

The Taney case, *supra*, was affirmed by the Supreme Court at 232 U.S. 174 (1914).

In an effort to distinguish the Taney decision on the facts, the Trustee and the Bank repeatedly point out that "other warehouses were so close to Hedge-side that whiskey and spirits could be stored elsewhere within 72 hours, so that tax payments could be avoided", while that was not true in Taney.

Precisely such an argument, however, was repudiated in the Supreme Court's Taney decision. Mr. Justice (later Chief Justice) Hughes said, at pages 185-186 of his opinion:

"It is said that the distiller need not use his own warehouse, but may place the goods in one of the general bonded warehouses established under the act of 1894 (28 Stat. at L. 564, 565, chap. 349). The appellee asserts that this would be impracticable; that no general bonded warehouse had been established in the collection district in question; that there are only twelve in the entire country, with a capacity that is extremely small in comparison with the output of the distilleries. But, aside from this, the distillery warehouse is equally recognized by law; it is a 'bonded warehouse of the United States'. If it is a fit place for storage, the distiller is not obliged to remove the spirits elsewhere * * *

"The fundamental objection is that the custom, to which the entire trade is adjusted, is opposed to public policy. But we know of no

ground for thus condemning honest transactions which grow out of the recognized necessities of a lawful business. The case is not one where credit may be assumed to be given upon the faith of the ostensible ownership of goods in the debtor's possession. Every one dealing with distillers is familiar with the established practice in accordance with which spirits are held in store, under governmental control, and are transferred by the delivery of such documents as we have here." (Emphasis supplied).

The Bank and the Trust insist that the Taney case can be distinguished on the ground that California law is different from Pennsylvania, and that the Supreme Court decided the case "under Pennsylvania law". In the excerpt just quoted, however, Mr. Justice Hughes was expounding, not state law, but a Federal statute relating to "a bonded warehouse of the United States".

Similarly, in *Marchants' National Bank of Baltimore vs. Roxbury Distilling Company*, DC Md., 196 F 76, 101 (1912), the Court discounted the effect of the local law upon the problem now being discussed:

"But independent of the special enactment of Maryland with regard to distillery warehouses, I am in full accord with the special master in his conclusion that, because of the peculiar situation of the distilled spirits stored in a bonded distillery warehouse, there is by the transfer effected by the warehouse certificate as full a delivery of the goods as is commercially possible

under the special circumstances attending distilled spirits stored in the bonded distillery warehouses of the United States.” (Emphasis supplied)¹¹

15. Conclusion

The Court holds that the 574 barrels of grain spirits purchased by Schenley and later pledged by Hedgeside to the Bank, belong to Schenley.

Schenley likewise has a superior title to the so-called “Heaven Hill whisky”, produced by Franciscan, sold by it to Barnhill, by Barnhill to Heaven Hill, and by Heaven Hill to Schenley. The last receipt for this whisky was issued to Barnhill more than four months before the first warehouse receipt for it was pledged to the Bank by Hedgeside, which at no time owned the merchandise in question.

The 900 barrels of grain spirits purchased by Schenley from Franciscan, first stored at No. 111 and later transferred in bond to No. 2, belong to Schenley for the reason that a transfer into bond constitutes a sufficient change of possession. Furthermore, the Bank has not shown that it was a creditor of Franciscan during the time that these 900 barrels remained in Franciscan’s warehouse, No. 111. Only

¹¹ See also *Bache v Hinde*, 6 Cir., 6 F 2d 508, 510, note 3 (1925), certiorari denied, 269 U. S. 581 (1925); *Brown v Cummins Dist. Corp.*, DC Ky., 53 F Supp 659, 664 (1944); *Wells Fargo Nev. Nat’l Bank of S. F. v Haslett Warehouse Company*, 60 Cal. App. 225, 228-229 (1922), petition for hearing in the State Supreme Court denied (1923); *Lederer v Railway Terminal & Warehouse Co.*, Ill., 178 N. E. 394, 396 (1931).

a creditor of Franciscan while the latter remained in possession could, under any theory, attack the sale to Schenley.

Nor will the Trustee be permitted to establish that, under the alter ego theory, he is in reality also a creditor of Franciscan as well as of Hedgeside. The "corporate veil" may not be pierced to work an injustice.

As the representative of Hedgeside—Schenley's bailee with regard to the 900 barrels of Mountain View grain spirits—the Trustee cannot question the title of his bailor, on the ground of the so-called delayed transfer from No. 111 to No. 2.

Furthermore, Schenley has established that it comes within the ambit of the California Warehouse Receipts Act, which our Court of Appeals repeatedly has declared has repealed Section 3440 "so far as the latter might otherwise apply to warehoused goods".

Apart from all this, however, because of the Government's tight control over distillers, storage of alcoholic products in an Internal Revenue Bonded Warehouse constitutes a sufficient change of possession under the California Bulk Sales Act.

Finally, Schenley or Schenley's predecessors in interest acquired a title to all of the 8,933 barrels of whisky and spirits that was prior in point of time to that of the Bank. In the absence of determinative considerations to the contrary, Schenley should not be deprived of the fruits of this priority. The Court does not find such countervailing elements present here.

Under all the facts, which are undisputed, and under all the legal principles applicable to those facts, to deprive Schenley of what, in good faith, it bought and paid for, would be "rigour and not law".

The Referee's Findings of Fact and Conclusions of Law, except as hereinbefore noted, and his Order are approved and affirmed.

Dated: August 18th, 1952.

/s/ DAL M. LEMMON,
United States District Judge.

[Endorsed]: Filed Aug. 18, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Charles W. Eb-
nother, the duly qualified and acting Trustee of the
estate of the above named bankrupt corporation,
one of the respondents to the Reclamation Petition
filed by Schenley Industries, Inc., a corporation, on
October 3, 1949 in the above proceeding for the
purpose of reclaiming certain properties inventoried
in the above bankrupt estate, hereby appeals to the
United States Court of Appeals for the Ninth Cir-
cuit, from the final order of the Honorable Dal M.
Lemmon, United States District Judge of the above
entitled court, signed and filed on August 18, 1952,
affirming the order of the Honorable Bernard J. Ab-
rott, Referee in Bankruptcy, signed and filed on

January 10, 1952, granting said Reclamation Petition.

Dated at San Francisco this 16th day of September, 1952.

/s/ FRANCIS P. WALSH,

/s/ HENRY GROSS,

/s/ JAMES M. CONNERS,

Attorneys for Charles W. Ebnother,
Trustee in Bankruptcy.

[Endorsed]: Filed Sept. 16, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Anglo California National Bank of San Francisco, a national banking association, one of the respondents to the Reclamation Petition filed by Schenley Industries, Inc., a corporation, on October 3, 1949 in the above proceeding for the purpose of reclaiming certain properties inventoried in the above bankruptcy estate, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final order of the Honorable Dal M. Lemmon, United States District Judge of the above entitled court, signed and filed on August 18, 1952, affirming the order of the Honorable Bernard J. Abrott, Referee in Bankruptcy, signed and filed on January 10, 1952, granting said Reclamation Petition.

Dated at San Francisco this 16th day of September, 1952.

/s/ FREDERICK M. FISK,
/s/ CHICKERING & GREGORY,
Attorneys for Appellant Anglo California National
Bank of San Francisco.

[Endorsed]: Filed Sept. 16, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

Reclamation petition filed by Schenley Industries.

Answer of Trustee to petition in reclamation.

Answer of Anglo California National Bank to petition in reclamation.

Order on reclamation petition.

Petition for review.

Referee's certificate on petition for review.

Supplement to Referee's certificate on petition for review.

Opinion and order of the District Court.

Notice of appeal of Trustee.

Notice of appeal of Anglo California National Bank.

Cost bond on appeal.

Designation of contents of record on appeal (Trustee).

Designation of contents of record on appeal (Anglo California Bank of San Francisco).

Order extending time to docket appeal.

Nine (9) volumes of Reporter's Transcript.

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 29th day of October 1952.

[Seal]

C. W. CALBREATH,
Clerk.

/s/ By C. C. EVENSEN,
Deputy Clerk.

In the Southern Division of the United States
District Court, for the Northern
District of California

In the Matter of

HEDGESIDE DISTILLERY CORPORATION, a
corporation,

Bankrupt.

TRANSCRIPT OF PROCEEDINGS ON
PETITION IN RECLAMATION
OF SCHENLEY

Oakland, Calif., October 18, 1949, 10:00 a.m.

Before Honorable Bernard J. Abrott, Referee in
Bankruptcy.

Appearances: Bronson, Bronson & McKinnon, by
Kirk La Shelle, Esq., and John Ward, Esq., Attor-
neys for Petitioner. Chickering & Gregory, Fred-
erick M. Fisk, by Frederick M. Fisk, Esq., and
Bruce M. Casey, Jr., Esq., Attorneys for The Anglo
California National Bank. Francis P. Walsh, Esq.,
Attorney for Trustee. [1*]

CHARLES W. EBNOTHER

called as a witness on behalf of the Petitioner, being
first duly sworn, testified as follows:

By Mr. La Shelle: I take it, Counsel, I can dis-
pense with the usual qualifying evidence as to Mr.
Ebnoter being the Trustee and so forth.

* Page numbering appearing at top of page of original Re-
porter's Transcript of Record.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: That's agreeable.

Mr. Walsh: That's satisfactory. We stipulate.

Direct Examination

By Mr. La Shelle: Q. Mr. Ebnother, we served on you a short time ago a subpoena calling for certain documents. I take it that you have those documents with you. I am particularly interested—

A. Most of them; not all of them.

Q. I am particularly interested at the present time with Section 2 of the Subpoena, cancelled negotiable warehouse receipts—no, no, number 3, I made a mistake. The following non-negotiable warehouse receipts issued to Barnhill by Hedgeside covering the cancelled—on or about January 3rd. Have you those with you? A. I have.

Q. May we have them, please?

(Witness hands the documents to Counsel.)

Q. Now, you have got five warehouse receipt books here, one in your hand there. A. Yes.

Q. And I take it that in these five books, scattered throughout [19] apparently are the warehouse receipts in question? A. Yes.

Q. And they are in all five of them, are they?

A. (There was no answer.)

Q. They run through all five of them?

A. Yes.

Q. And—

A. All of the negotiable ones are in this book.

Mr. Walsh: What book are you talking about, Mr. Ebnother, for the record? Will you identify it?

(Testimony of Charles W. Ebnother.)

Mr. La Shelle: This book is labeled, Counsel, "Negotiable 351 to 400"; I take it that's the——

The Witness: That's the number of the receipts.

Mr. La Shelle: Q. Of the receipts?

A. That's right.

Q. These are all negotiable? A. Correct.

Q. And the other ones here bear the legend here, "Non-negotiables 3151 to 3200", so that they may be identified. Then there is this book, has the legend "Non-negotiables 3201 to 3250". Apparently, there are 50 receipts to a book.

Mr. Fisk: Could I have that last one? I didn't get it.

Mr. La Shelle: 3201 to 3250. Apparently, there are 50 receipts to a book. The next is labeled 3251 to 3300B, the letter "B" appearing after the number, non-negotiable. And the next is 3301 to 3350B, non-negotiable. In due course, Your Honor, we will want to introduce into evidence not all of these but some of them, but at the present time I want to have Mr. Johnson check certain numbers off of these to complete his work on the schedule, and if I can, I would like to hand them to Mr. Johnson. He will check them right here in the court room.

The Referee: You have no objection, Mr. Walsh?

Mr. Walsh: I have no objection.

The Referee: Mr. Fisk?

Mr. La Shelle: I am wondering if we should have these marked for identification in any way.

Mr. Fisk: I think that would be the best.

Mr. La Shelle: I think we should.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: Just for the purpose of the record, the first two, or rather, the first book of non-negotiables that you read off, Mr. La Shelle, 3201 to 3250, you didn't say anything about a "B". I take it there should have been a "B" there, is that right?

Mr. La Shelle: No, I don't think so.

Mr. Fisk: Well, I don't know, myself. I just want to——

Mr. La Shelle: The first book is 3151 to 3200—no letters.

Mr. Walsh: Well, it will show on the warehouse receipt itself.

Mr. La Shelle: The next one is 3201 to 3250, no letters; the next one is 3251 to 3300, then there is a "B".

The Witness: That "B" is on all of them.

Mr. Walsh: I am sure it is on all of them. [21]

Mr. Fisk: The "B" is on all the non-negotiables, as I understand.

Mr. Walsh: Examine the receipts.

The Referee: All the non-negotiable warehouse receipts have a "B", and there are no letters on the negotiable receipts. You are offering these for identification at this time?

Mr. La Shelle: Identification only at this time, Your Honor.

Mr. Walsh: May I ask a question at this time? Are all these non-negotiable warehouse receipts, particularly the ones that were issued to Barnhill?

Mr. La Shelle: That's what we expect.

(Testimony of Charles W. Ebnother.)

The Referee: Is that correct, Mr. Ebnother?

Mr. Walsh: Wait a minute, Your Honor.

The Witness: I can't answer that, Sir.

The Referee: Well, who is going to testify now? If this is going to be testimony, we better have Counsel sworn in. The only man that I have sworn in—

The Witness: Your honor, they subpoenaed certain receipt numbers, and all I did was to look those numbers up and be sure they were in those books.

Mr. La Shelle: That's correct. That's all we ask for. In other words, we are just getting this for identification at this time, for our accountant to check.

The Referee: Mr. Walsh?

Mr. Walsh: Mr. La Shelle answered my question about [22] Barnhill.

Mr. La Shelle: I mean, I am not attempting to give evidence. It is so stipulated.

Mr. Walsh: The question recently asked in my opinion is incompetent at this time, because Mr. Ebnother is not competent to testify as to what is in the books.

The Referee: No, but my question was, after you had asked Counsel the fact.

Mr. Walsh: No, I am asking if he made that statement.

The Referee: Oh.

Mr. Fisk: One other thing that the record is

(Testimony of Charles W. Ebnother.)

not clear on, and that is, these are books of the Hedgeside Distillery Corporation.

The Witness: Yes. They were taken from the books and records of the Hedgeside Distillery Corporation.

The Referee: Negotiable Volume 351 to 400, Petitioner's No. 1 for Identification; 3151 to 3200 Non-negotiable, Petitioner's No. 2 for Identification; 3201 to 3250 Non-Negotiable, Petitioner's No. 3 for Identification; 3251 to 3300 Non-Negotiable, Petitioner's No. 4 for Identification; 3301 to 3350 Non-Negotiable (and all the Non-Negotiables have a "B" on them), Petitioner's No. 5 for Identification. [23]

* * * * *

OLIVER I. JACOBSON

called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

The Referee: Your full name?

A. Oliver I. Jacobson.

Q. S-o-n, or s-e-n? A. S-o-n.

Direct Examination

Mr. La Shelle: Q. Mr. Jacobson, where do you live?

A. In Beverly Hills, California.

Q. And what is your business, Mr. Jacobson?

A. I'm a whisky broker and factor.

Q. And how many years, approximately, have you been engaged [61] in that business?

A. Since 1933.

(Testimony of Oliver I. Jacobson.)

Q. Since the repeal?

A. Since the repeal of the Eighteenth Amendment.

Q. And in the latter part of the year 1947 and the early part of 1948, were you doing business as an individual or partnership, or were you with a corporation? A. Corporation.

Q. And what was the name of that corporation?

A. Heaven Hill Corporation.

Q. And at that time, what was its place of business?

A. 650 South Spring Street, Los Angeles, California.

Q. And the Heaven Hill Corporation, I take it, had a Federal Basic Wholesaler's Permit?

A. We have Federal Basic Permits and Licenses from the State Board of Equalization, State of California, as manufacturers' agents.

Q. And sometime during the month of December, 1947, did you make a deal to purchase certain whisky from Barnhill Distillery Company?

A. Yes.

Q. And whom did you make that deal with?

A. With Mr. Mark Glaser.

Q. And that's Mark Glaser of Glaser Brothers?

A. Of Glaser Brothers, yes.

Q. And had you done business with them before?

A. I had been doing business with Glaser Brothers since 1934 or 1935. [62]

Q. And in the deal of this whisky, would you

(Testimony of Oliver I. Jacobson.)

just tell us how that deal was made? In other words, was it a formal written contract, or letter, or 'phone call, or what?

A. Mr. Mark Glaser let it be known that he had certain whisky for sale. I spoke with him on the telephone a number of times and I agreed to purchase that whisky from him.

Mr. Fisk: Well, I ask the last answer go out, as calling for his conclusion.

The Referee: So ordered.

Mr. La Shelle: Q. Well, state as near as you can recollect what the 'phone conversation was with Mr. Glaser, what you said, and what he said.

A. "What kind of whisky is it, how is it packaged? Where is it stored? What price do you want?" And I said, "Yes". And that was that.

Q. Now, I have here, and I'll show you, Mr. Jacobson, what purports to be an original invoice, number 439, to Heaven Hill Corporation from Barnhill Distillery Corporation, which you gave to me at my request, and that particular invoice you had where?

A. In the regular files in the office.

Q. Of the Heaven Hill Corporation?

A. Of the Heaven Hill Corporation.

Q. And you kept that as part of your permanent business records? A. Oh, sure.

Q. And you will notice there, under "Price", that it says, "90" on each item.

A. That's right. [63]

(Testimony of Oliver I. Jacobson.)

Q. And I take it that that means 90 cents per proof gallon.

A. That's right, original proof gallon.

Q. Original proof gallon?

A. Original proof gallon.

Q. And then, of course, these out here (indicating) are the extensions? A. That's right.

Q. And that was the purchase price.

A. That's right.

A. And I'll also show you what purports to be a draft, drawn on Heaven Hill Corporation to the Bank of America, payable to the American Trust Company, in the sum of \$131,983.70. Was that also in the business files of the Heaven Hill Corporation?

A. That's right.

Q. Which you gave to me at my request?

A. That's right.

Mr. Fisk: May I interrupt you, Counsel? Did you say Bank of America?

Mr. La Shelle: Yes, that's what it says.

Mr. Fisk: I beg your pardon.

Mr. La Shelle: To Bank of America, N. T. and S. A.

Mr. Fisk: That's right, I beg your pardon.

Mr. La Shelle: Q. And I take it that that cancelled draft was given to you in due course by the Bank after it had been paid?

A. That's right.

Q. Now, I also have—do you recall you first sent me this, saying that you found it in your files?

A. That's right.

(Testimony of Oliver I. Jacobson.)

Q. And then I 'phoned you to locate the original invoice and [64] cancelled drafts. And would you just run through this file and see if you recognize this as the file you first sent me?

Mr. Fisk: May I see the file?

Mr. La Shelle: Oh, I'm sorry. I might state, Mr. Fisk, that the photostatic copy that you were looking at a moment ago in that bunch there, those are photostatic copies of copies of this, not the original. They were taken from Barnhill's files.

Q. I'll also show you this file, which consists of various letters, documents, and one thing and another, and do you recognize that as the file which was sent me sometime ago? A. That's right.

Q. And this file, which the first thing on the top of the file (it's all clipped together) is the copy of the other invoice of Barnhill Distilleries Company?

A. Correct.

Q. And consists of various documents, all of which are clipped together; this, together with the draft I just mentioned and the original invoice, constitutes all of your original records that you kept in the course of business of Heaven Hill on this transaction? A. That's right.

Mr. Fisk: Your Honor, I haven't seen the document, but obviously those aren't records kept by them in the regular course of business. They are not original records. At the most, they purport to be copies of documents made by the Bank [65] of America and letters made by Heaven Hill.

(Testimony of Oliver I. Jacobson.)

Mr. La Shelle: They are records kept in the course of his business.

Mr. Fisk: You said, his original records kept in the regular course of business.

Mr. La Shelle: They are. They're the only records he's got. Here is the original invoice——

The Referee: Just a minute——

Mr. Fisk: The records are not kept by Heaven Hill, this witness, or his Company. They may have been received in the regular course of business, but they are not the records kept——

Mr. La Shelle: That's exactly the records received by them, and which constitute their file on this subject in the regular course of business, is that right?

Mr. Fisk: Q. Is that your testimony, Mr. Jacobson?

The Witness: I believe so, yes.

The Referee: Well, take a look at the document, and what is your testimony?

The Witness: All these papers that I am holding here were in our files, and we received them in the regular course of business, either from the respective banks involved or companies, and are copies of correspondence that we sent to Glaser Brothers.

Mr. Fisk: But Mr. Jacobson, are those all documents that you received, or are they just simply documents that you found [66] in the files of your Company upon receiving an inquiry from Mr. La Shelle?

A. These papers were in our files.

(Testimony of Oliver I. Jacobson.)

Q. And that's all you know about them? They were in your files. Is that correct?

A. Well, they've been there for a couple of years.

Q. Well, did you receive them? Did you receive those documents personally?

A. Our office did—stenographer.

Q. You didn't hear the question. I ask the last answer go out.

The Referee: So ordered.

Mr. Fisk: Q. Did you personally receive those documents? A. (There was no answer.)

Q. Well, isn't the obvious answer that you didn't, Mr. Jacobson? Isn't that your present recollection?

A. I didn't, personally—they weren't put in my hand, no, but these are in our files, the same as—there are tens of thousands of papers in our files that, if I were to refer to them and pick them up, I would say all these papers are relative to a purchase that I made from Mark Glaser and a sale made in turn to Schenley. And these papers are relative to that.

Mr. Fisk: And I ask that that answer go out.

The Referee: Yes, so ordered.

Mr. La Shelle: I submit that answer is a competent answer.

The Referee: It isn't up to this witness to decide [67] whether or not they are irrelative.

Mr. Fisk: Q. Are any of those documents addressed to you, Mr. Jacobson?

A. Not personally.

(Testimony of Oliver I. Jacobson.)

Q. What was your position with Heaven Hill in the fall of 1947?

A. I was President of the Company—President-Treasurer.

Q. During that period, were you in Los Angeles?

A. Yes, sir.

Q. Did you receive any correspondence from Barnhill or Mr. Mark Glaser in connection with this transaction? A. Personally?

Q. Yes. A. No.

Mr. Fisk: That's all, Your Honor. I submit that the witness got nothing but copies of the papers out of his file and sent them——

Mr. La Shelle: I haven't even offered them yet.

Mr. La Shelle: Q. Who is Mr. — I think his name is Harry Homel.

A. That's my associate, Vice President and Secretary of the Company at the time.

Q. By "Company", you mean Heaven Hill?

A. Heaven Hill Corporation, my associate.

The Referee: Mr. La Shelle, so the record will be clear on the subject, I think some of the documents should be identified. Otherwise, the record is just going to say this and that, and there is no indication whatsoever as to what we are talking about.

Mr. La Shelle: Well, at this time I offer in Evidence [68] the original invoice of Barnhill Distilleries Company Number 439.

The Referee: Petitioner's Exhibit Number 8 in Evidence.

(Testimony of Oliver I. Jacobson.)

Mr. La Shelle: And also the cancelled draft, which I have shown to Counsel here, dated January 5, 1948, drawn by Barnhill Distilleries Co. on the Heaven Hill Corporation to the Bank of America at Los Angeles, payable to the order of the American Trust Company of San Francisco, the amount being \$131,983.70.

The Referee: Petitioner's Exhibit Number 9 in Evidence.

Mr. La Shelle: Q. Now, Mr. Jacobson, this file here is a separate file, which is hard to identify, and supposing that we have the Judge write on the back, "Petitioner's Exhibit Number 10 for Identification," covering all the documents clipped together, so that we can have a record as to what we are talking about.

The Referee: Number 10 for Identification.

Mr. La Shelle: Q. Now, to make the record clear on Number 10 for Identification, this is what was in your files, whether you received it or made it, those were in your business files, which you kept in the ordinary course of business?

A. Yes sir.

Mr. Fisk: Q. At what time?

A. All the time. Since the transaction was made.

Q. Well, do you know that of your own personal knowledge?

A. Well, that's impossible. We have large files and many files. [69] I mean——

Q. Did you personally remove these from your files? A. Personally, myself.

(Testimony of Oliver I. Jacobson.)

Q. On what occasion?

A. On occasion of his request, of Mr. La Shelle's request.

Q. How long ago was that?

A. I believe last week, or the week before. Last week?

Mr. La Shelle: Well, in the last thirty days.

The Witness: In the last thirty days.

Mr. La Shelle: Counsel, I'm not particularly concerned about putting this in Evidence. I don't think it adds anything to the picture, in addition to the last two Exhibits that just went in, as far as proving our case is concerned. The only reason I have had it here is so that, if you wish, you may examine it, go through with it, ask him any questions you want about it. We are not hiding anything. This is the complete file.

Mr. Fisk: It's marked for Identification.

Mr. La Shelle: It is marked Number 10 for Identification. I am not concerned whether it goes in Evidence or not.

Q. Now, I take it that you are familiar with Mr. Homel's signature? A. Yes.

Q. I'll show you here, Mr. Jacobson, what purports to be invoice number 232A of the Heaven Hill Corporation, made out to Schenley Distillers Corporation, the unit price being \$1.02½ a gallon, and the extensions bring it out to a total [70] of, perforated there, \$150,314.77.

A. It's \$150,314.77, that's right.

Q. Is that one of your invoices?

(Testimony of Oliver I. Jacobson.)

A. Oh, yes.

Q. And I'll also show you here a cancelled draft, drawn by Heaven Hill Corporation on Schenley Distilleries Company, which I will call "Schenley's", and call to your attention the signature of what purports to be Harry L. Homel.

A. That is his signature.

Q. That's his signature. I ask that these two be marked for Identification only at this time, Your Honor.

Mr. Walsh: What is the date of that?

Mr. La Shelle: The date of the draft is January 5, 1948. I wonder if Your Honor, as these all came together, if you mark them, too, on the back for Identification.

The Referee: The draft and the invoice accompanying the draft, one Exhibit for Identification Number 11.

Mr. Fisk: What was the date of that invoice, Mr. La Shelle?

Mr. La Shelle: Date?

Mr. Fisk: On the invoice, yes.

The Referee: January 25, 1948, invoice number 232A.

Mr. La Shelle: Q. I'll also show you—you have seen these, haven't you, you know what these are—cancelled negotiable warehouse receipts?

Mr. Fisk: I don't know. I don't know as I have seen those particular ones. I would like to see them, if you [71] don't mind.

Mr. La Shelle: Q. Referring to Petitioner's

(Testimony of Oliver I. Jacobson.)

Exhibit Number 1 for Identification, which is a book of negotiable warehouse receipts of the Hedgeside, I'll show you what purports to be negotiable receipt number 384 of Hedgeside Distillery Corporation for whisky described on there, and note that one of the signatures has been torn off and on the reverse side you will find, in one spot here, the imprint of a rubber stamp of apparently Heaven Hill Corporation, "By", and then the signature of what purports to be one Harry L. Homel. Do you recognize that signature?

A. That's Mr. Homel's signature.

Q. I'll also show you number 385 negotiable warehouse receipt in this book, and on the reverse side again the stamp of Heaven Hill Corporation and the signature of Harry L. Homel. Do you recognize that signature as your associate's, Mr. Homel?

A. Yes, I do.

Q. And the same with reference to 386, again the signature of Harry L. Homel; do you recognize that signature as his?

A. Yes, I do.

Q. And the same as to warehouse receipt number 387, again Heaven Hill Corporation, Harry L. Homel?

A. Yes, I do.

Mr. La Shelle: I think that covers all of the ones, doesn't it? [92]

Mr. Ward: That's right.

Mr. La Shelle: Q. And is that Harry L. Homel, who was an officer?

A. Yes.

Q. What position did you say?

A. Vice President and Secretary.

(Testimony of Oliver I. Jacobson.)

Q. He was Vice President and Secretary, and you were President and Treasurer.

A. That is right.

Mr. Fisk: Q. Is Mr. Homel alive?

A. Oh, yes, he's alive, we're still associated.

Mr. La Shelle: I think that's all.

The Referee: Mr. Walsh?

Mr. Walsh: No questions at this time.

The Referee: Mr. Fisk?

Cross Examination

Mr. Fisk: Q. Mr. Jacobson, did you communicate with Mr. Mark Glaser first, or did he communicate with you first regarding this matter?

A. I don't remember that, as to whether I spoke with him first, or he spoke with me first. We had talks very, very often, because they were regular customers of mine, and——

Q. That is, Glaser Brothers were regular customers of yours? A. Yes.

Q. And you did quite a bit of business with them?

A. Oh, yes, various matters and various things all the time.

Q. Well, then, I assume that he communicated with you first, and advised you that he had this liquor—— [93]

A. That's right.

Q. ——on hand, is that right?

A. That's right.

(Testimony of Oliver I. Jacobson.)

Q. Did you do any business with Mr. R. I. Stone?

A. I did business with Mr. R. I. Stone when he was connected with Glaser Brothers.

Q. Well, Mr. Stone was formerly connected with Glaser Brothers?

A. Well, Stone was formerly a buyer for Glaser Brothers—liquor buyer.

Q. And you had considerable contact with him——

A. Yes.

Q. ——— in that connection? A. Yes.

Q. Did you ever have any contact with him, by way of doing business with Hedgeside?

A. I think so. I don't think I ever consummated a deal, I don't remember, but I don't think I ever consummated a deal with Mr. Stone or Hedgeside, but I think at various times through the years I might have contacted him via the telephone or by correspondence, asking a market price on his whisky or in connection with bottling or something; I mean, I'm in connection with practically every distillery where there's a possibility of my doing any business.

Q. Did you do any business with Mr. Stone by way of Franciscan? A. Oh, no, never.

Q. Never. A. Never.

Q. You never have done any business with Franciscan at all?

A. The name is unfamiliar to me. [94]

Q. How did you learn that Schenley was interested in this whisky?

(Testimony of Oliver I. Jacobson.)

A. It's our business to know—you see, I can explain possibly. The whisky business in bond, for example in the State of Kentucky, is a matter of record, and the ownership of the whisky in the distilleries, which distiller owns which whisky, is also a matter of record. A distillery continues to bottle in continuity. Now, if they run short of whisky, it's very apparent and obvious from the records that they're light certain inspection and brokers.

Mr. La Shelle: You might explain what inspection is.

The Witness: Inspection is the monthly whisky—the month and the day that the whisky is produced.

Mr. Fisk: Q. Well, do I understand your testimony to be that there are records kept in Kentucky of all the liquor owned by all distillers?

A. Oh, sure.

Q. All over the United States, the number of barrels?

A. That's true, the number of barrels of whisky in each distiller's warehouse in bond — United States Government bonded warehouse in the State of Kentucky.

Q. Now, does Kentucky keep a record of whisky in bond in the State of California?

A. No, just in Kentucky.

Q. Well, I am now asking you, how did you learn that Schenley was interested in this whisky?

A. We don't have to learn. If we have something, we offer it. [95] Sometimes, even without checking records, as to whether a man is short or

(Testimony of Oliver I. Jacobson.)

not, we offer it and broadcast it. Some brokers send out postcards, some brokers send out files, letters, use the long-distance telephone. We're a very small group comparatively.

Q. In this particular instance, what means did you use to get into contact with Schenley with regard to the sale of this whisky.

A. I 'phoned them.

Q. You telephoned? A. That's right.

Q. Whom did you telephone?

A. I telephoned the chairman of the Board, Mr. Louis Rosenstiel.

Q. And what did you advise him?

A. That I had so many barrels of whisky to sell, would he be interested.

Q. Can you fix the approximate date of that telephone conversation?

A. I know it was in December of 1947, to the best of my recollection. Schenley Distillers buy from every broker and from many sources all the time.

Q. Are you certain in this instance that you went to Schenley, or that Schenley came to you?

A. I went to Schenley.

Q. You are positive of that?

A. I am positive of that.

Q. You are certain that you didn't go through some other broker?

A. That could have been. That's quite [96] possible—quite possible.

Q. Are you certain that a broker from Schen-

(Testimony of Oliver I. Jacobson.)

ley's—a broker representing Schenley's didn't come to you?

A. A broker representing Schenley. I don't remember, but that's also possible. Many things can enter into a transaction. We try to consummate a sale any way that we can.

Q. When Heaven Hill bought this whisky from Barnhill, you, of course, knew where the whisky was produced, did you not? A. Oh, yes.

Q. Do you recall now where it was produced?

A. I want to correct myself there. It comes back to me now. I have the impression that the whisky was produced by Hedgeside Distillery, and when it was sold to me it was represented as Hedgeside whisky, in Napa, California. When the invoice came in, I noted "Mountain View Distilling Company". I am now talking from memory, and I can't be absolutely exact. I believe at that time I 'phoned Mark Glaser, and I believe he said to me it was a tenant operation or a d.b.a. I said, "Was it made at the Hedgeside plant at Napa?" I believe he said, "Yes". I says, "Is the whisky all right?" "Yes. Okay".

Q. What is a d.b.a.?

A. "Doing business as". A distiller can use a trade name.

Q. In other words, Mark Glaser told you that Hedgeside was doing business as Mountain View?

A. Not in those words. I don't know the word that he employed. [97]

Q. But that was the substance of it?

A. You see, there are innumerable d.b.a.'s and

(Testimony of Oliver I. Jacobson.)

tenant's distillery operations at various distilleries that the Alcohol Tax Unit permits, and you may make whisky under ten different names or a hundred different names at one distillery. But in the brokerage world, if that whisky was produced at a specific distillery, regardless of the name under which it was produced, the custom is significant. It's accepted as that distiller's whisky.

Q. But as I understand your testimony collectively, under various statements you have made here this morning, you knew nothing of Franciscan or Mountain View. You did know of Hedgeside?

A. That's right.

Q. You did know Mr. Stone and the tenor of your conversation with Mr. Mark Glaser was that this whisky—you asked him if it was Hedgeside, and he said, "No", but it was all right, that it was probably a d.b.a., or something—

A. Words to that effect, yes.

Q. That's right. Heaven Hill, I know, paid ninety cents a proof gallon. Who determined that figure?

A. It was offered at that price. The seller.

Q. You received an offer from Mark Glaser at ninety cents a proof gallon, is that right?

A. That's right.

Q. And that figure was acceptable to you?

(The witness nods affirmatively.)

Q. And you bought it on that basis?

A. That's right. [98]

Q. I note that, from the draft, you sold it—

(Testimony of Oliver I. Jacobson.)

Heaven Hill sold it to Schenley for \$1.02 per proof gallon.

A. \$1.02½.

Q. \$1.02½. Who determined that figure?

A. I did.

Q. You offered it to Schenley at that figure?

A. I think I offered it for more than that. We finally compromised at \$1.02½. That's all he would pay.

Q. That is Mr. Rosenstern?

A. Rosenstiel.

Q. Rosenstiel.

A. The market was very strong at the time.

Q. In connection with this sale, did you have any correspondence, or Heaven Hill or Mr. Homel or anybody connected with Heaven Hill have any correspondence, with Schenley?

A. (Nods negatively) I don't remember that.

Q. You can't say whether you did or not?

A. No, but I don't think so. I just spoke to Mr. Rosenstiel. It was a deal.

Q. Now, will you have your records checked and determine whether or not there was any correspondence between Heaven Hill and Schenley on this transaction? Will you do that?

A. I will.

Mr. La Shelle: If I might interrupt there—this is all that he could find.

Mr. Fisk: The witness has said he will make an investigation, and I request that he do so. [99]

Mr. La Shelle: Well, I am not going to bring

(Testimony of Oliver I. Jacobson.)

this witness back from Los Angeles, I'll tell you that.

Mr. Fisk: Well, we will keep him here until we get it, then.

Q. Now, Mr. Jacobson—

A. May I add something, please?

Q. No, you answer my questions. If you want to explain your answer, why—

A. No, I mean pertinent to the thing that we were talking about that you asked me before.

Q. About correspondence—have you any correspondence? A. Yes.

Q. Yes.

A. When I said—Mr. La Shelle, I asked the girl to get me the file on this matter. She brought me the file, and that primarily is the entire file, everything that was in the files. I sent it to Mr. La Shelle, everything.

Q. Practically?

A. Well, I mean I can't be sure. We have large files. That was the entire file.

Q. Well, from your examination, is it your statement under oath that there was no correspondence on this transaction between Heaven Hill and Schenley?

A. Between Heaven Hill and Schenley on this transaction?

Q. Yes sir, other than what is produced here in the court room here this morning?

A. Oh, I can't say that. I can't remember well enough. [100]

(Testimony of Oliver I. Jacobson.)

Q. Then you will make a check and find out, if there is? A. I will definitely make a check.

Q. Did you have any conversations or correspondence with Mr. Mark Glaser or Glaser Brothers or Barnhill, concerning this transaction?

A. I don't remember that, either.

Q. Would you check on that?

A. I'll check on that.

Q. Did you have any communications with Mr. Mark Glaser regarding the price you were to charge Schenley? A. No.

Q. That was a matter entirely within the control—

A. That was my job.

Q. Of Heaven Hill? A. That's right.

Q. And you had nothing to do with the price that was set by Mr. Mark Glaser, excepting that you accepted it?

(Witness nods affirmatively.)

Q. His offer, is that correct?

A. That's right.

Q. Did you know that at this time Schenley had a production agreement with Franciscan to take all of its production? A. I did not.

Q. You did not?

A. I never knew it at any time.

Mr. Fisk: If Your Honor please, that is all at this time, but I would like to keep the matter open and have the [101] witness make the check, and I am perfectly willing that he send it up to Mr. La Shelle, and Mr. La Shelle advise me.

(Testimony of Oliver I. Jacobson.)

The Referee: Mr. Jacobson, you understand that?

The Witness: Yes, I do.

The Referee: Mr. Fisk's suggestion, rather than keep you here or make you return, you will instruct your office, or you, yourself, will send any communication, correspondence, anything that you have on this matter, to Mr. La Shelle?

The Witness: That I had in relation to it, any correspondence that I might have had with the Schenley——

The Referee: Any correspondence that you had with reference to your purchase of this whisky, number one; and number two, the sale of it.

The Witness: Right.

Mr. Fisk: And in that connection, if the Court please, depending on what develops, I would like to reserve my right to have a further cross examination of this witness, if I see fit. I will take the necessary steps to do it by way of deposition or something of that type, but I don't want to foreclose any right for further cross examination if I see fit to have any.

The Referee: That's right. That's understood by the Court, and it is so ordered. In the event that you desire to bring him back, it will be at your expense. In the event that you desire to take his deposition, you will make the arrangements. Mr. La Shelle, you understand that; no objection? [102]

Mr. Fisk: You are agreeable to it, are you, Mr. La Shelle?

(Testimony of Oliver I. Jacobson.)

Mr. La Shelle: I have no objections.

The Referee: Anything further, Mr. Walsh?

Mr. Walsh: No questions.

Mr. La Shelle: I have just one or two questions I would like to ask.

Redirect Examination

Mr. La Shelle: **Q.** You will recall, Mr. Jacobson, when you sent me first the Exhibit Number 10, the copy of the file, which apparently the girl wrote you and I 'phoned you, insisting there must be a cancelled draft, original invoice; and did you look for everything, or did you personally make that search? **A.** Personally.

Q. Did you find anything else at that time other than the cancelled drafts and the original invoice?

A. No.

Q. And with reference to your testimony, as whisky broker when you buy from "A" and sell to "B", and so forth, customarily in your business do you have formal contracts or letter contracts covering that, or do you handle it by the 'phone and discussions or what would you; just explain that to the Court.

A. We are a very small group in the brokerage business. We don't have six, maybe eight, in the United States, whisky brokers or factors. We're in constant communication with one another. If we have something to sell, we get on the [103] telephone, because the market fluctuates. The market's very fast, it's up and down daily, so naturally we

(Testimony of Oliver I. Jacobson.)

can't wait to use the mails. We call on the telephone; that's part of our expense and our business. We offer it. We buy or we sell. It may involve a million dollars, Your Honor, but if we say we bought it, we bought it; and if the other party says he sold it, he sold it. No confirmation may ever pass, excepting that telephone conversation, until one secures his invoice or drafts, the invoice accompanying the draft with the warehouse receipts attached. And that's all that ever happens, and there have been hundreds of millions sold throughout the year in that manner. One default, and you're out of business.

The Referee: Q. Did you people actually take possession of the whisky that we're talking about here?

A. Sometimes we do, sometimes we don't.

Q. No; I say, the whisky we're talking about. Did you actually take possession of it?

A. No, we never take possession. It's all handled in negotiable warehouse receipts.

Q. How long would you say lapsed between the time you purchased and the time you sold it to Schenley; how long were you holding it?

A. Your Honor, I don't remember, but I would say in the ordinary course of business, before the warehouse receipts and the invoice are made, from a week to three weeks elapse.

Mr. Fisk: Your Honor, I ask that that go out.

The Referee: I said, in this particular instance.

(Testimony of Oliver I. Jacobson.)

The Witness: Perhaps two to three weeks, I can't remember.

The Referee: Q. You don't know?

A. It's impossible.

The Referee: Very well.

Mr. Fisk: Q. Did you pay Schenley, or did Schenley pay you before you paid Barnhill?

A. Would you repeat that, please?

(The last question was read by the reporter.)

A. Oh, Schenley never would pay for anything, unless they get the warehouse receipts and examine it.

Q. I still ask you, did you receive your money from Schenley before you paid Barnhill?

A. I did not.

Q. You did not.

A. Wait a minute, I take that back. I received—the draft was paid by Schenley before I paid Barnhill. That's quite right. It involved a lot of money, and that's right.

Q. And——

A. We had the privilege of redrafting.

Q. You never saw this whisky at all?

A. No.

Q. You just had in your hands, I take it, or your Company did, warehouse receipts of Hedgeside, is that correct?

A. Yes. All whisky is handled that way. It's in United States Government Bond, it's got to be tax paid.

(Testimony of Oliver I. Jacobson.)

Mr. Fisk: I ask the answer go out as not responsive. [105]

The Referee: So ordered.

Mr. Fisk: Q. All you had in connection with the whisky itself in this transaction was the warehouse receipts of Hedgeside, is that right?

A. That's right.

Mr. Fisk: That's all.

Mr. La Shelle: Just one moment.

Q. What do you mean. You mention you had the privilege of redrafting. What do you mean by that?

A. Well, if it involved a lot of money, we buy it from the source. They always send a sight draft, naturally, with invoice attached, and warehouse receipts. We ask for the privilege of taking out those warehouse receipts on trust receipts and redrafting. We may not have enough money in the bank at the time, and send a redraft. When the draft is paid, that portion which belongs to the seller is transferred on by the bank to the seller; that's customary in our business and quite regular.

Q. And the balance goes——

A. That's right.

Mr. Fisk: Q. Mr. Jacobson, did you buy this whisky from Barnhill as the principal, or did you handle the transaction as a broker?

A. It's understood that I'm a broker.

Q. Well, in this——

The Referee: Wait a minute, Mr. Fisk.

Q. Regardless of whether it being understood

(Testimony of Oliver I. Jacobson.)

that you're a broker or not, what is your answer to Mr. Fisk's question? [106] Did you handle this transaction as a broker—

Mr. Fisk: Q. Or did Heaven Hill buy it as principal?

A. May I say something, Your Honor?

The Referee: Surely.

The Witness: It's difficult. There's a line of demarcation there which isn't understood by people outside of our business. Brokers ordinarily have a commission man, but a broker in the whisky business is not a commission man. He is actually a factor. He may make an arrangement on a straight commission basis, or he may buy and sell but still as a broker.

The Referee: Q. Well, let me ask you this: Before you actually consummated the deal with Mark Glaser, did you already have a purchaser for this whisky?

A. No, I had no purchaser at that time.

Mr. Fisk: Q. Did you have a commitment?

A. I had no commitment in advance.

Q. You are sure of that?

A. From Schenley, is that the question?

Q. From anybody.

A. To sell—to sell the whisky?

Q. That's right.

A. I had no commitment in advance. I am sure of that.

Q. From anybody? A. From anybody.

Q. You take the warehouse receipts of Hedge-

(Testimony of Oliver I. Jacobson.)

side, 384, 5, 6, and 7. Did you actually receive those warehouse receipts, [107] or did they go directly from Barnhill to Schenley?

A. Personally, I never saw a Hedgeside Warehouse receipt in my life. I don't handle the details or the mechanics of a transaction.

Q. Do you know whether or not Glaser Brothers acted as a broker or the principal in this transaction?

Mr. La Shelle: We object to the form of that question, Your Honor, as calling for the conclusion and opinion of the witness.

The Referee: He asked him if he knew.

Mr. Fisk: He's been telling us quite a bit about it, the difference between a whisky broker and factor.

The Referee: You can answer that. Did you know whether they were——

A. I was in no position to know, Your Honor.

The Referee: Very well.

Mr. Fisk: Q. You didn't know

A. I was in no position to know.

Q. Well, did you know?

A. At the time, I was in no position.

Q. Well, do you know now?

Mr. La Shelle: I make the same objection to that, as incompetent, irrelevant and immaterial.

The Referee: Q. Did you know at the time?

(Witness nods negatively.)

Mr. La Shelle: Don't shake your head. [108]

(Testimony of Oliver I. Jacobson.)

The Witness: I mean, did I know at the time. I did not know at the time, Your Honor.

Mr. Fisk: Q. Do you know now?

A. I do not know now.

Q. Does it make any difference as to what commission you can charge, whether you buy and sell as principal or as broker? A. No sir.

Q. It does not, because there are no limitations on the commissions that a whisky broker may charge? A. No sir.

Q. Did the Heaven Hill Company in connection with this transaction receive any non-negotiable warehouse receipts of Hedgeside?

A. Yes, they sent us non-negotiable warehouse receipts, and Mr. Homel sent them back and demanded negotiable warehouse receipts, because we don't handle anything but—they have got to be strict negotiables, or we don't handle it.

Q. Do you recall the number of non-negotiable warehouse receipts that were sent to you?

A. No sir, I don't.

Q. I believe you testified that you have never seen a Hedgeside warehouse receipt.

A. That's right.

Mr. La Shelle: The record might show that the information upon which Counsel is cross-examining is from Petitioner's Exhibit No. 10 for Identification.

Mr. Fisk: Q. Well, as I understand your testimony, you [109] can't personally say whether or

(Testimony of Oliver I. Jacobson.)

not any warehouse receipts, negotiable or non-negotiable, were ever received by Heaven Hill.

A. Oh yes, my instructions are to my office not to accept anything but strictly negotiable warehouse receipts properly endorsed.

The Referee: Just a minute, Mr. Fisk. Will you read Mr. Fisk's question and the witness's answer?

(The last question and answer were read by the reporter.)

Mr. Fisk: And I ask that answer go out as not responsive.

The Referee: So ordered.

Mr. Fisk: Q. Do you understand the question? You have no personal knowledge of whether or not any receipts at all—any warehouse receipts at all, were ever received?

A. Excepting this, if you please.

Q. Well, will you answer my question, "Yes" or "No", and then explain it?

A. Well, I can't.

Q. Answer "Yes" or "No", and then explain it.

A. Personally, no. Now, you let me answer.

Q. Now give your explanation.

A. I mean, the explanation. I couldn't sell it, nor would it be acceptable to Schenley, unless it were negotiable.

Mr. Fisk: Well, that is a conclusion of the witness, and I ask that it go out, Your Honor.

The Referee: So ordered. The witness has already [110] testified that he has never seen a Hedge-side Warehouse receipt; is that correct?

(Testimony of Oliver I. Jacobson.)

A. That's right, Sir.

Mr. Fisk: As I understand the record, the only testimony that this witness has given with respect to these warehouse receipts is that he recognizes the signature of Harry L. Homel as being the signature of his partner. That's the extent of his knowledge on these warehouse receipts, is that not true?

The Witness: That is right.

Mr. La Shelle: That's all I have attempted to show.

Cross Examination

Mr. Walsh: Q. Mr. Jacobson, one or two questions on Petitioner's Exhibit No. 10 for Identification, that is your office file. Now, I would like to have you examine this again, particularly the letter—carbon copy of the letter.

Mr. La Shelle: Do you want the original?

Mr. Walsh: Just a minute. We heeded to you. Now let me cross-examine the witness. I want to show that he doesn't know anything about it.

The Referee: Mr. Walsh, for the record, will you please tell the court reporter the date of that letter you are asking about?

Mr. Walsh: Yes, carbon copy of the letter dated December 30, 1947.

Q. Now, Mr. Jacobson, I understood from your testimony of the direct examination that this is a carbon copy of a letter [111] which you had in your files. A. Apparently.

Q. Now, Mr. Jacobson, examine it. I don't think you understand some of the testimony you gave.

(Testimony of Oliver I. Jacobson.)

A. Well, this is a copy of the letter that Mr. Homel, my associate sent to Glaser Brothers.

Q. Will you examine the pencil writing on this carbon copy?

A. The attached list was copied from one which we received from Glaser Brothers, but which was returned with the non-negotiable warehouse receipts for their records.

Q. Now, whose writing is that?

A. I don't know, maybe the girl in the office.

Q. Would you know whose writing it is, Mr. Jacobson?

A. No sir, I don't. Now, here is the list he is referring to.

Q. Do you know that this is a copy of the original list that is in your office?

A. This is what Glaser Brothers sent us.

Q. Will you read the witness the question, Miss Reporter, please?

(The last question was read by the reporter.)

Mr. Walsh: Q. Do you know if this is a copy of the original list in your office? Just answer my question "Yes" or "No".

A. Read it again, please.

(The last question was read by the reporter.)

A. You want a "Yes" or "No" answer? [112]

Q. Yes. A. No.

Q. You do not know? A. No.

Q. Now, Mr. Jacobson, you made the statement that you are a broker and a factor. When you make the statement that you are a broker, do you use that

(Testimony of Oliver I. Jacobson.)

in the general term, or the general meaning of the term, factor? A. Yes.

Q. And what is the general meaning of the term, factor, in the merchandising business?

A. All right. If you, as a manufacturer, were to approach me to tell me that you would sell me something that I wanted, that you were making at a specific price, but you wanted me in advance in order to make it I would make partial payment in advance against that product, so I could secure it at an advantageous price and resell. In other words, I will buy in advance of production.

Q. In other words, the term factor implies the procedure of financing to a certain extent?

A. That's right.

Mr. Walsh: That's all I want to know.

The Witness: That's right. That's my impression and understanding of the word, factor, as I use it.

Mr. Walsh: Q. Was there any financing in this transaction? A. None.

Q. None required. Do you know if Heaven Hill transferred any warehouse receipts to Schenley's when this transaction [113] was consummated?

A. I don't understand the question.

Mr. Walsh: Read the question, Miss Reporter, please.

(The last question was read by the reporter.)

A. Our office endorsed these warehouse receipts, and that was a transfer to Schenley, yes.

Q. Did you endorse them, yourself?

(Testimony of Oliver I. Jacobson.)

A. No, Mr. Homel did.

Q. Now, I want you to examine these warehouse receipts, 384, 385, 386, and 387—of course, you can't, because you testified you have never seen those.

A. To the best of my knowledge I have never seen them.

Q. Well, you can't tell us whether or not these warehouse receipts were ever in the possession of Heaven Hill? A. They must have been.

Q. How do you know that?

A. That's right.

Mr. La Shelle: I submit that this is not proper cross examination. The man has emphatically stated five times he has never seen, of his own personal knowledge. That's the end of it, and I think we are taking up a lot of useless time.

The Referee: For the information of Counsel, I will go further than that. Reading the Trustee's Answer, he admits that the warehouse receipts were in existence.

Mr. La Shelle: That's true, that is true, Your Honor, and I don't see any purpose of this, other than just take time [114] and delay the proceedings.

(Discussion off the record.)

The Referee: Anything further, gentlemen, of Mr. Jacobson?

Mr. La Shelle: One more question.

Q. Just to identify this, I'll show you the original or what purports to be the original of a letter Mr. Walsh showed you written by Heaven Hill Corporation to Glaser Brothers, and on the second

(Testimony of Oliver I. Jacobson.)

page ask you if you can identify the signature of Mr. Homel there?

A. That is the signature of my associate.

Q. That's his signature, and that's the letterhead that you were using at that time?

A. That's right.

Mr. La Shelle: We offer that as Petitioner's Exhibit for Identification next in number, Your Honor.

Mr. Walsh: Let the record show that this was just handed to Mr. La Shelle in court by Mr. Jaffa, attorney for Glaser Brothers.

Mr. La Shelle: Where else do you think I would get it?

(Discussion off the record.)

The Referee: The letter dated December 30th, 1947, on the letterhead of Heaven Hill Corporation, signed with the signature, "Harry L. Homel, Vice President, Heaven Hill Corporation", will be Petitioner's Exhibit Number 12 for Identification. Very well, Mr. La Shelle, you may proceed. [115]

Mr. La Shelle: One more question.

Q. When you buy, say you bought this lot of whisky (as I understand it, I'm not sure), you buy on your own account and try to sell for more?

A. That's right.

Q. As the market goes down, you lose?

A. Yes, and that's frequent.

Q. As it goes up, you win?

A. That's right.

Q. Something like the stock market?

(Testimony of Oliver I. Jacobson.)

A. Exactly.

(Discussion off the record.)

Mr. La Shelle: All right. I think that's all, Mr. Jacobson.

The Referee: Mr. Jacobson, you are excused, with the previous admonition.

* * * * * [116]

ROBERT H. BAGLIN

called as a witness on behalf of the Petitioner, being first duly sworn by the Referee, testified as follows:

The Referee: Your full name?

A. Robert H. Baglin, B-a-g-l-i-n.

Q. Robert Baglin, and where do you reside, Mr. Baglin? A. San Carlos.

Q. Do you have a route number?

A. 166 Alberta Avenue.

Q. San Carlos. Very well, Mr. La Shelle.

Direct Examination

Mr. La Shelle: Q. Mr. Baglin, what is your capacity with Schenley Industries?

A. San Francisco plant manager.

Q. And approximately how many years have you been in that capacity? A. Five years.

Q. And were you with the Company before that?

A. I was.

Q. Climbed up the ladder, I take it?

A. Yes.

Q. With reference to the reduction from Franciscan and Hedgeside of spirits that we have been

(Testimony of Robert H. Baglin.)

talking about here, would you just explain to the Court generally how you handled that, with reference to the approval of the spirits, how the invoices and warehouse receipts came in, and generally how it was wone?

Mr. Fisk: You have reference to what particular spirits? Just any spirits? During this period?

Mr. La Shelle: Yes, everything except the stored Heaven Hill stuff; he had nothing to do with that.

Mr. Fisk: Nothing to do with whisky?

Mr. La Shelle: Well, I think there might be a few barrels of whisky in the lot, outside of Heaven Hill; was there?

The Witness: Yes, there was.

Mr. La Shelle: Q. But it was mostly the grain spirits—I might refer to the Schedule here. If you will look at the “C”, the one I gave you with the letter “C” on it, it would cover the first part of the page, where it says, “Spirits produced or purchased under the terms of the contract dated November 1, 1945”; the spirits and whisky purchased from Hedgeside under contract dated October 13, 1947. Then, the next one, spirits produced and purchased under the terms of the contract dated October 13, 1947. It would cover all of the second page, with the exception of purchase of whisky by Schenley Distillers Corporation and Heaven Hill Corporation. It does not cover that. He had nothing to do with that. And it would cover the next page, and it would cover the last page. In other words, it would cover everything except the 2,859 barrels which we have

(Testimony of Robert H. Baglin.)

designated informally as the Heaven Hill purchase, to distinguish it from the others.

I might, to speed things up a little bit, as I understand it, the first part of some of those spirits was first handled direct with the New York office of Schenley's. A. That is right.

Q. And then, that method was changed and it was handled [187] out here? A. That's right.

Q. And that's more or less when you stepped into the picture? A. That's right.

Q. Now, with reference to that phase of the case—you might tell us this first: Did Schenley have one of its employees up in the plant, inspecting the whisky or spirits as it was produced?

A. We did.

The Referee: What plant, Mr. La Shelle?

Mr. La Shelle: Pardon me?

The Referee: What plant?

Mr. La Shelle: I mean the Hedgeside and Franciscan.

The Referee: You meant what?

Mr. La Shelle: Hedgeside and Franciscan.

Q. In other words, Schenley had one of its employees at Napa, inspecting the batches of spirits and/or whisky as it was produced?

A. That is right.

Q. And what was his name?

A. Mr. Walter del Tredici.

Q. The spelling of that Tredici?

A. T-r-e-d-i-c-i. I think it's Walter del Tredici.

(Testimony of Robert H. Baglin.)

It's really an odd name. I'm not absolutely sure of that spelling.

Q. Starting from there, will you tell us approximately how that was handled; I mean, what was done, and how was it handled, in a general way.

A. Well, under the contract, we were paying for the spirits [188] and/or whisky under two prices.

The Referee: Under what contract?

A. Under the contract of October 13, 1947.

Mr. Fisk: Your Honor, I am going to make an objection to this——

Mr. La Shelle: Here, we have it here.

Mr. Fisk (continuing): ——to this form of examination.

The Referee: Sustained.

Mr. Fisk: I think he should ask him question-and-answer form.

The Referee: The objection is sustained.

Mr. La Shelle: I am trying to speed this up. I have all of these, and suggest we mark them for Identification now. There are photostats behind all of these. That's why they're clipped together, and I have got this for ease of handling. H-1 means Hedgeside, and that's the first contract. That's the date of the contract.

(Discussion off the record.)

Mr. La Shelle: Do you want to mark it for Identification in the righthand corner? There are quite a few of them. Some of them probably don't mean much, because they were obsolete at the time.

The Referee: A document addressed to Schenley

(Testimony of Robert H. Baglin.)

Distillers Corporation, dated September 13, 1945, and signed by Hedgeside Distillery Corporation by R. I. Stone, President, with a memorandum attached, with the red letters H-1, 9-1-45, [189] will be marked Petitioner's Number 14 for Identification.

Mr. Fisk: Would the Court state on whose behalf Stone purports to sign, or is it just signed "Stone"?

The Referee: It's signed "Hedgeside Distillery Corporation, by R. I. Stone, president." A document——

(Discussion off the record.)

The Referee: Let the record show that the memo referred by the Court is merely a yellow slip of paper, with the red pencil notation, "For convenience", placed on there by whom, Mr. La Shelle?

Mr. La Shelle: By myself, in my handwriting, and not considered part of the evidence. It's just simply a——

The Referee: The next document is addressed to the Hedgeside Distillery Corporation, Napa, California, and it's signed "Schenley Distillers Corporation, by——

Mr. La Shelle: Seskis, S-e-s-k-i-s.

The Referee: His initials?

Mr. La Shelle: Well, I think it's "J", I'm not sure.

The Referee: Mr. Baglin?

The Witness: I am not conversant with his signature, but it is J. Seskis.

(Testimony of Robert H. Baglin.)

The Referee: And the hand signature is J. Seskis, Vice President; and also on the document, dated the 7th day of September, 1945, "Accepted and agreed to, Hedgeside Distillery Corporation, by R. I. Stone, President."

Mr. La Shelle: I think that's dated the 17th.

The Referee: Did I say the 17th?

Mr. Fisk: You said the 7th.

The Referee: The 17th, pardon me, you're correct, Mr. La Shelle. 17th day of September, 1945, and that will be marked Number 15 for Identification. And it also has the memo heretofore referred to, H-2-9-17-45.

The next document—

Mr. La Shelle: I am also showing Counsel—I'll show them photostatic copies of this.

The Referee: The next document is on a letterhead, "Schenley Distillers Corporation, Empire State Building, 350 Fifth Avenue, New York City", dated September 17, 1945, addressed to Hedgeside Distillery Corporation, Napa, California; it is signed, "Very truly yours, Schenley Distillers Corporation, by—", and the same gentleman, "J. Seskis, President;" and over on the lefthand side, "Accepted and agreed to; Hedgeside Distillery Corporation, by R. I. Stone"; and what appears to be in pen and ink, "P-r-e-s." Although the Court is not testifying, that is what it appears to be, and that will be marked Petitioner's Number 16.

Mr. Fisk: For Identification.

(Testimony of Robert H. Baglin.)

The Referee: For identification. And Petitioner's Exhibit Number 16 has the memo, H-3-9-17-45.

The next document is on a letterhead, "Schenley Distillers Corporation, 582 Market Street, San Francisco 4, California", dated November 1, 1945, addressed to Hedgeside [191] Distillery Corporation, Napa, California, signed, "Very truly yours, Schenley Distillers Corporation, by—", it looks like "J. A. Woolsey".

Mr. La Shelle: J. E. Woolsey. I know that signature.

Mr. Walsh: J. what?

The Referee: James E. Woolsey, W-o-o-l-s-e-y, "Assistant Secretary, Accepted and agreed to, Hedgeside Distillery Corporation, by R. I. Stone", and also what appears to be P-r-e-s period. And there is also the memo, H-4-11-1-45. Petitioner's Exhibit Number 17 for Identification.

The next document is on a letterhead, entitled, "Schenley Distillers Corporation, 582 Market Street, San Francisco 4, California," dated December 21, 1945, addressed to "Hedgeside Distillery Corporation, P. O. Box 269, Napa, California, Attention R. I. Stone, President." The document is signed, "Schenley Distillers Corporation, by——"

Mr. La Shelle: M. J. Nauheim. I know that signature.

The Referee: Vice President, and the notation, "Accepted and agreed to, Hedgeside Distillery Corporation, by R. I. Stone," and on this document the typewritten notation, "President". And there is at-

(Testimony of Robert H. Baglin.)

tached to that, "H-5-12-21-45". Will be marked Petitioner's Exhibit Number 18 for Identification.

The next document is on the letterhead, "Schenley Distillers Corporation, 582 Market Street, San Francisco 4, California". The document is dated February 14, 1946, addressed to "Hedgeside Distillery Corporation, Napa, California", [192] signed, "Schenley Distillers Corporation, by M. J. Nauheim", signed and typewritten, "Vice President". "Accepted and agreed to, Hedgeside Distillery Corporation, by R. I. Stone", and then, typed in, is, "R. I. Stone, President"; and the memo attached, "H-6-2-14-46". Will be marked Petitioner's Number 19 for Identification.

The next document has a pen notation at the top, "Duplicate Original"; typewritten, "Agreement entered into this 30th day of April, 1947, between Schenley Distillers Corporation, a Corporation herein called Schenley, and Hedgeside Distillery Corporation, a Corporation herein called Hedgeside." The document is three pages in length. It is signed, "Schenley Distillers Corporation, by James E. Woolsey, its Assistant Secretary, Hedgeside Distillery Corporation, by Albert A. Axelrod, its Assistant Secretary." Attached is a memo, "H-7, 4-30-47". Petitioner's Exhibit Number 20 for Identification.

The next document is dated May 7, 1947, addressed to "Schenley Distillers Corporation, 850 Battery Street, San Francisco, California," three pages in length, signed "Hedgeside Distillery Cor-

(Testimony of Robert H. Baglin.)

poration, by R. I. Stone, its President", and then entirely handwritten in ink, "Accepted Schenley Distillers Corporation, by James E. Woolsey, its Assistant Secretary"; and there is also attached memo "H-8-5-7-47". That document will be Petitioner's Exhibit Number 21 for Identification. [193]

The next document is on a letterhead, Hedgeside Distillery Corporation, Alcohol Division, dated October 13, 1947, addressed to Schenley Distillers Corporation, 593 Market Street, San Francisco, California, attention of Mr. James E. Woolsey. The document itself is two pages in length, and is signed "Hedgeside Distillery Corporation, by R. I. Stone, approved Schenley Distillers Corporation, James E. Woolsey, Assistant Secretary", and attached to the letter—

Mr. La Shelle: I don't think it's attached. It's clipped. There are two different documents here. I guess they're both dated the same date.

The Referee: The document just referred to, dated October 18, 1947, to Schenley Distillers, signed by Hedgeside Distillery Corporation, by R. I. Stone, is Petitioner's Exhibit Number 22, for Identification.

Mr. La Shelle: I would suggest that if that is dated on the same day, that we can make these 22-a.

The Referee: We will make the one just referred to Petitioner's Exhibit 22-a.

Mr. La Shelle: The next one will be 22b.

The Referee: The next document, which will be marked Petitioner's Exhibit 22-b, is entitled in the first paragraph, "This contract is made and entered

(Testimony of Robert H. Baglin.)

into this 13th day of October, 1947, between Schenley Distillers Corporation, a Delaware Corporation, herein called Schenley, and Hedgeside Distillery Corporation, a California Corporation, herein called Hedgeside," [194] and according to the numbers on the document, it is 28 pages in length, and is signed "Schenley Distillers Corporation, by James E. Woolsey, Assistant Secretary, Hedgeside Distillery Corporation, by R. I. Stone, President". Petitioner's Exhibit Number 22-b for Identification.

The next document is on a letterhead marked, "Schenley Distillers Corporation, 582 Market Street, San Francisco 4, California," and it is dated December 5, 1945, addressed to R. I. Stone, 18 Sixteenth Avenue, San Francisco, California, signed "Very truly yours, Schenley Distillers Corporation, M. J. Nauheim, Vice President. Accepted and agreed to, R. I. Stone, d.b.a Franciscan Farm and Livestock Co."

Mr. La Shelle, do you want that letter to be one Exhibit for Identification purposes? I see there are other documents attached to it.

(Discussion off the record.)

Mr. La Shelle: Those should be separate.

The Referee: The letter just referred to——

Mr. La Shelle: I think if that's later in point of time, it would be better if you put this first.

The Referee: The letter just referred to will be marked Petitioner's Exhibit Number 24.

(Discussion off the record.)

The Referee: So the document just referred to

(Testimony of Robert H. Baglin.)

is Petitioner's Exhibit Number 24 for Identification.

Mr. La Shelle: 23 is coming up. [195]

The Referee: The next document is addressed to R. I. Stone, 18 Sixteenth Avenue, San Francisco, California. According to the notation on the sheets, the last page is page 10, dated the 1st day of November, 1945, "Schenley Distillers Corporation, by M. J. Nauheim, Vice President, Accepted and agreed to, R. I. Stone." No indication under Stone's name. That will be marked Petitioner's Exhibit 23 for Identification.

Mr. Fisk: Are you going to leave these copies, or are you going to take them away from us?

Mr. La Shelle: Well, I tell you, I am giving them to you now, as a matter of courtesy, so you can look them over. I'll be glad to share them with you or let you make copies yourself. I haven't got any extra copies. I've got one photostatic copy here that I want to substitute as soon as I can, because the Company wants these original records back. I told them to make three copies, but they didn't. I might be able to find some extra copies, I don't know.

Mr. Fisk: That's all right. I don't mean that. I don't want to impose on you to furnish me with a copy, except that I would like to have them, so I could make copies. They are quite voluminous, and it will take some little time to digest it.

Mr. La Shelle: Except that you will find that most of them are obsolete.

(Testimony of Robert H. Baglin.)

Mr. Fisk: Obsolete? [196]

Mr. Walsh: Obsolete?

Mr. La Shelle: I mean, they are spirits that are not in question here, that were produced under those earlier contracts.

The Referee: Well, then, what is the relevancy?

Mr. La Shelle: I am just having them marked for Identification, so if they look for anything, regardless, they can have them. We have nothing to **hide**.

(Laughter.)

Mr. Fisk: On that basis, I assume you are going to let us have copies?

Mr. La Shelle: I am, I am not obligated. As a matter of courtesy, I am giving them to you; if you want to keep them over night, that's fine. I'll share them with you. I may need them later on, but for the time being, at least, you can have them. I wanted to have extra copies made, so they can give you one. As a matter, I specified white, and I got a few white and mostly black, and that's the way things go.

The Referee: Very well, gentlemen; the next document is dated October 13, 1947, addressed to "Schenley Distillers Corporation, 593 Market Street, San Francisco, California, Attention of Mr. James E. Woolsey", signed, "Franciscan Farm and Livestock Co., by R. I. Stone". Also on the document, "Schenley Distillers Corporation, Approved James E. Woolsey, Assistant Secretary". Now, that will be

(Testimony of Robert H. Baglin.)

marked Petitioner's Exhibit Number 25 for Identification. [197]

Mr. La Shelle, there is also a contract. Would that be a separate Exhibit?

Mr. La Shelle: Is that the same date?

The Referee: It's the same date.

Mr. La Shelle: Yes, why don't we do that—25-a and 25-b.

The Referee: That document will be marked Petitioner's Exhibit 25-a for Identification, and a document entitled "Contract made and entered into this 13th day of October, 1947, among Schenley Distillers Corporation, a Delaware Corporation, herein called Schenley, Franciscan Farm and Livestock Co., a California Corporation, herein called Franciscan, and R. I. Stone, an individual, herein called Stone." The document is 19 pages in length, signed, "Schenley Distillers Corporation, by James E. Woolsey, Assistant Secretary, Franciscan Farm and Livestock Co., by R. I. Stone, President, and R. I. Stone". That will be marked Petitioner's Exhibit Number 25-b for Identification.

Mr. La Shelle: Well, again, I find myself in a set of circumstances. I would like Mr. Riley to give you his books, so he can go back in just a couple of minutes.

The Referee: Very well, Mr. Baglin is temporarily excused. Mr. Riley? Mr. Fisk.

* * * * * [198]

(Testimony of Robert H. Baglin.)

Further Direct Examination

Mr. La Shelle: Q. Now, Mr. Baglin, you told us that Mr. Tredici was up there, checking the batches of production as they were produced?

A. That's right.

Q. Now——

Mr. Walsh: Just a minute. To preserve the record, you mean both the production at Franciscan and the production at Hedgeside?

Mr. La Shelle: That's right.

Mr. Walsh: Both.

Mr. La Shelle: Q. And not the exact date, but approximately when did he start doing that?

A. I would say it would be sometime possibly in November of 1947.

Mr. Walsh: I am going to ask that answer go out as not proper direct examination. In other words, there is no [208] foundation laid. They could produce this witness.

Mr. La Shelle: We will produce Mr. Tredici. I can't put every witness on the stand at once, Your Honor. I am putting this man on; he was in charge, general charge of the operation, to show generally how it was handled. That's all. Mr. Tredici will be produced, unless he dies in the meantime.

The Referee: Very well, then, proceed.

Mr. Walsh: Just a minute, Your Honor; if Mr. Tredici, or whatever his name is, is the best man to answer the particular question asked. He said, "possibly". He's not even sure of that.

(Testimony of Robert H. Baglin.)

The Referee: As I understand from Mr. La Shelle's former statement, he just wanted to give generally the background, and then you were going into the matters that have some importance. Is that correct?

Mr. La Shelle: That's right.

The Referee: And certainly, as far as the date is concerned, that Mr. Tredici was there, if Mr. Tredici is going to be here later on, you will furnish that—Mr. Tredici's statement as to the date; it has precedence over this witness. Will you?

Mr. La Shelle: Yes.

Mr. Fisk: Are you going to produce Mr. Tredici?

Mr. La Shelle: Yes sir. You seem to think we want to hide everything.

Mr. Walsh: To save the record, you have been objecting [209] very loudly about cluttering up the record, and you are doing just what you accuse us of. In other words, why ask this man something that a man who knows something about it can testify?

Mr. La Shelle: This man was in general charge of the operation, isn't that right?

The Witness: That's correct.

The Referee: Mr. Walsh's objection is overruled, based on the statement that Mr. La Shelle has made with reference to the production of Mr. Tredici at a later date, and with the further statement that his date will be the controlling date. Now proceed.

Mr. La Shelle: Q. Now, directing your attention to the period of time following October 13, 1947,

(Testimony of Robert H. Baglin.)

what were your general duties with reference to processing this production and purchasing it, and so forth; what did you do?

Mr. Walsh: Now, if Your Honor please, I am going to object—

The Referee: Before you do, Mr. Walsh, Mr. La Shelle will be a little more explicit with reference to what processing are you talking about.

Mr. La Shelle: With reference to the purchase and sale of these spirits.

The Referee: You mean, that are the subject of this litigation before the Court?

Mr. La Shelle: That's it, Your Honor.

The Referee: Go ahead, Mr. Walsh. [210]

Mr. Walsh: I withdraw that objection.

The Witness: A. Mr. del Tredici would perform certain laboratory experiments to determine whether or not the spirits were suitable for beverage purpose, or suitable for redistillation. He would be given the invoices of the Hedgeside Distillery Corporation, which would indicate the price at which we were to purchase the spirits, either as beverage spirits or for redistillation.

Mr. La Shelle: I take it, if I may interrupt you for a moment, there was a difference in the price, naturally.

A. There was a difference in price. Mr. del Tredici would sign these invoices, two copies of which would be directed to my attention in San Francisco, the other two copies would be given back to Hedgeside.

(Testimony of Robert H. Baglin.)

Mr. Walsh: Your Honor, how much of this testimony are you going to permit to go in? The testimony that Mr. Tredici is the only man who can testify to.

The Referee: You are making an objection?

Mr. Walsh: Yes, Your Honor.

The Referee: Sustained.

Mr. Fisk: I'll join in the objection.

The Referee: Sustained.

Mr. La Shelle: I think this man can state, being in charge of the overall production, what the man's duties were to do.

The Referee: I know, Mr. La Shelle, but this witness [211] is testifying now as to what Mr. Tredici was doing on them, and you are going to have Mr. Tredici here. We might as well get it firsthand.

Mr. La Shelle: Q. Suppose we put it this way: Let's assume that a certain invoice or a certain document comes down for the purchase and sale of a lot of spirits; what came through, and what did you do with it?

A. Two copies of the invoice came to my attention; I would direct one to the Accounts Payable section——

Q. Wait a minute. When they came, did they have any notation on the form to a particular employee?

A. Yes, they were signed by Mr. del Tredici.

Q. And did they have an okay, or words to that effect?

A. They did.

(Testimony of Robert H. Baglin.)

Q. And then, when you got those, what did you do with them?

A. I directed one copy to the Accounts Payable section, and the other copy to the Inventory section.

Q. Then they were processed for payment pursuant to your giving them to the Accounts Payable section, I take it?

A. That is correct.

Q. And then, when the invoices came in, did they have on them—we will produce these later, Your Honor—the warehouse receipt number covering them, and so forth?

A. They would.

Q. And in making payment to those, whom did Schenley pay?

A. Schenley paid the Anglo California Bank.

Q. And what did you do with reference to picking up the warehouse receipts?

A. I don't know the mechanics of our Accounts Payable section, whether the bank messengers picked up their checks and made delivery of the warehouse receipts, or whether their own messenger went to the bank, made payment, and picked up the warehouse receipts.

Mr. Fisk: Your Honor, I am going to enter an objection to this line of testimony, for the reason it is apparent that what Counsel is trying to do is to claim some kind of an estoppel on the part of the bank, because certain of these invoices went through the bank's Escrow Department, or something of that kind. Now, if he is going to do that, he is not talking about the general practice of Schenley's. He is talking about specific transactions. Obviously, Schen-

(Testimony of Robert H. Baglin.)

ley's didn't make a practice of sending or processing every transaction through the Anglo Bank.

And I am going to ask that his testimony go out on that ground.

Mr. La Shelle: I submit that's all right if it would serve to show the same thing, that the same general practice was done.

Mr. Fisk: It isn't general practice. He is talking about specific transactions.

The Referee: I sustain Mr. Fisk's objection.

Mr. La Shelle: Q. When you got the two invoices with [213] Walter Tredici's okay on them, and the invoice showed the number of the warehouse receipts, at the same time that you got the invoice did you get the warehouse receipts with the invoice? A. No, I did not.

Q. And with reference to the exact mechanics, as to how you got that invoice, you don't know; that went through another Accounts Payable section, is that correct?

A. I don't believe I get your question, Mr. La Shelle.

Q. Do you know of your own knowledge how or from whom you ultimately got the warehouse receipts on invoices that were paid?

A. That's right.

The Referee: What do you mean, "that's right"? Do you know?

The Witness: Yes, I do.

Mr. La Shelle: Q. Well, how did——

(Testimony of Robert H. Baglin.)

A. Through the bank, of course. Anglo California Bank.

Mr. Fisk: Your Honor, I am going to renew my objection—make an objection that it is irrelevant, incompetent, and immaterial in this proceeding as to what they did generally. After all, if he is going to show that in this case, these particular warehouse receipts were processed in a particular way, it's the easiest way in the world to put a witness on. He can even subpoena someone from the bank to do it.

The Referee: Sustained. [214]

Mr. Fisk: I don't know how this is enlightening.

Mr. La Shelle: Well, he states he knows.

Mr. Fisk: He doesn't know.

Mr. La Shelle: He was in general charge of the operation. Surely, if the girl in the Accounting Department or the clerk got it, you would never be able to prove that.

Mr. Fisk: I object. There is no proper foundation laid.

Mr. La Shelle: That's all. You may cross examine.

Mr. Fisk: No cross examination.

Mr. Walsh: No cross examination on behalf of the Trustee.

The Referee: You are excused, Mr. Baglin.

Mr. Walsh: Your Honor, please, I am going to make a motion at this time, on behalf of the Trustee, that all the testimony of this witness go out.

Mr. Fisk: And I will join in.

The Referee: Well, Mr. Walsh, I don't know that there is any testimony in.

Mr. Walsh: I don't like to have the record cluttered up, if Your Honor please.

The Referee: I don't know what there is, if there is anything. He gave his name and address.

Mr. Fisk: I'll join with him, because Mr. La Shelle made that offer——

Mr. La Shelle: He states he was in general charge of [215] the operation. He okayed the bills; they came through him.

Mr. Walsh: This is off the record.

(Discussion off the record.)

The Referee: Well, so the record will be clear, the Court has already ruled on the individual objections that have been made, and the Court is denying the motion of Mr. Walsh and Mr. Fisk that the entire testimony be stricken.

Mr. La Shelle: All right. We will resume with Mr. Johnson now, if we may.

Mr. Johnson now, is we may. * * * * * [216]

WALTER DEL TREDICI

called as a witness on behalf of the Petitioner, being first duly sworn, testified as follows:

The Referee: Q. What is your name?

A. Walter Del Tredici.

Q. And spell your last name.

A. Capital D-e-l, Capital T-r-e-d-i-c-i.

Q. Where do you reside, Mr. Del Tredici?

A. 329 Laurel Avenue, San Anselmo.

The Referee: You may proceed, Mr. La Shelle.

(Testimony of Walter Del Tredici.)

Direct Examination

Mr. La Shelle: Q. All right, Mr. Tredici; you are employed by Schenley's, are you not?

A. Yes.

Q. And directing your attention to the latter part of the year of 1947 and 1948, you were employed by Schenley at that time, too, were you not?

A. Yes, that's right.

Q. And directing your attention to either October or November—I have forgotten just which is the month—were you up at Napa on a job for Schenley?

A. That's right.

Q. And approximately when was it that you first went up there?

A. First started in October, 1947.

Q. You don't recall the exact date that you went up there?

A. It was about the last week in October. [234]

Q. About the last week in October. And what was your job up there, what were your duties that you did?

A. Well, it was to be Schenley's representative to approve or reject the distillation of Hedgeside Distillery up there.

Q. And that did apply also to Franciscan?

A. Yes.

Q. The plants were about ten miles apart, something like that.

A. That's right.

(Testimony of Walter Del Tredici.)

Q. And you were up there to approximately how long? A. Well, to May 19, 1948.

Q. And with reference to the distillation and production up there, am I correct in stating that there were two types; one would be accepted for beverage purposes, and one would be accepted for redistillation? A. Right.

Q. And there was a certain price which would govern each? A. Right.

Q. And it was part of your duties to check that and to make laboratory tests of some metals up there? A. Right.

Q. And when a batch of production came off the assembly line, so to speak, would you just tell the Court what you did there?

A. Well, each morning I went up to work, and they would have the sample ready for my approval or rejection, and I would perform the chemical test, and then I would put in writing the results of my findings, and would instruct Hedgeside whether to put them in barrels or in steel drums. [235]

Q. In other words, you would tell Hedgeside whether or not you accepted it for beverage purposes, or had it labeled for redistillation?

A. Right.

Q. I take it, from time to time you had a number of arguments over that? Yes, we did.

Q. And those tests were made before or after barreling? A. Before barreling.

Q. And would those generally be made in the cistern room, or where would you make them?

(Testimony of Walter Del Tredici.)

A. I made them down at the Distillery.

Q. Down at the Distillery? A. Yes.

Q. And then did you take for an examination a batch that you accepted for beverage purposes, you would communicate that to the Hedgeside officials, who were there at the time? A. Yes.

Q. And following that, did the Hedgeside people make up an invoice? A. Yes, they did.

Q. Then, was that invoice presented to you—

A. Yes.

Q. And what would you do with that invoice, then?

A. Then I approved the invoice for payment by our office.

Q. And in approving it, would you sign it?

A. I wrote, "Approved for payment", put the date of payment and my name.

Q. I see. And do you recall how many copies there were of those invoices?

A. About six copies. [236]

Q. About six copies. And were they the type of invoice that would have carbons between them?

A. That's right.

Q. Or did you sign each one?

A. All together. Had carbon between each sheet.

Q. So that your signature would carry through?

A. That's right.

Q. And after those invoices were given to you— I'll show you an invoice that we have just taken at random from Mr. Johnson, a Franciscan Farm and Livestock Company invoice, number 299, dated

(Testimony of Walter Del Tredici.)

April 5, 1948, covering ten barrels of spirits grain at a total purchase price of \$375.48; and there are some other notations on it that appear here; and then, down in the lower lefthand corner appears the words written in pencil, "Approved for payment, 4-5-45, Walter Del Tredici". Is that your handwriting? A. That's right.

Q. And on the various invoices, either from Franciscan or Hedgeside, whichever it happened to be, that's the practice you followed? A. Yes.

Mr. Walsh: Now, just a minute, if Your Honor please, I am going to object to that question, and ask the answer go out, on the ground it contains a compound question that requires a compound answer. The first question relates to the Franciscan production, and the other relates to the Hedgeside production, and I think the proper way would be [237] to produce records showing the production from Hedgeside. These are two different situations—one production of Hedgeside, and one production of Franciscan.

The Referee: Will you please read the question?

Mr. La Shelle: If he wants, I'll withdraw the question.

The Referee: Very well, question withdrawn.

Mr. La Shelle: Q. Did you do the same thing that you have just told us, directing your attention to the Franciscan Farm and Livestock Company invoice, to approve those for payment?

A. Yes, I did.

(Testimony of Walter Del Tredici.)

Q. In the manner that you just described, after checking it? A. Yes.

Q. And did you also do that for Hedgeside?

Mr. Walsh: I object to that question as incompetent, irrelevant, and immaterial, because the invoice that you have right there is not a Hedgeside invoice; it's a Franciscan.

Mr. La Shelle: Well, I don't think that it is incumbent upon us, Your Honor, to take each one of those invoices and have them qualified by this witness.

The Referee: Maybe we can simplify this, gentlemen. We have got to speed this up. Mr. Johnson, do you have a Hedgeside, too?

Mr. Johnson: Yes, I have a Hedgeside here, too, same type of thing.

Mr. La Shelle: Q. Here is a Hedgeside invoice, and this is Number 1139, dated December 22, 1947, total amount [238] \$284.73, and in the lower left-hand corner appears the words, "Approved for payment, 12-22-47, Walter Del Tredici"; is that your signature? A. That's right.

Q. And, therefore, on Hedgeside invoices, you processed them in the same manner that you have told us here a little while ago after checking them, and then when the invoice was made up you approved it? A. That's right.

Q. In other words, once the invoice was made up, as I understand it, you had already approved it? A. That's right.

Mr. Walsh: May I see that, Mr. La Shelle?

(Testimony of Walter Del Tredici.)

Mr. La Shelle: Q. In other words, to clarify that, no invoice was made up until after you had passed on it, but for the reason that depending on whether or not it was for beverage purposes or re-distillation, the price would be different?

A. That's right.

Mr. Fisk: Objected to, as argumentative. I ask that the answer go out, Your Honor.

The Referee: It can go out, and Mr. La Shelle can accomplish the same purpose by reframing your question.

Mr. La Shelle: Q. What was the reason, then, to satisfy Counsel, that the invoices were not made up?

The Referee: Counsel said that your question was argumentative.

Mr. La Shelle: Q. What was the reason the invoices were not made up until after they were passed on? [239]

A. First of all, I had to make the tests and tell them what to do, and then they had to do a filldown, and then after the filldown the invoices were made up, and then I approved them.

Q. Let me ask you this, was there a difference in price between the two? A. Yes.

Q. Would that play a part in holding it up—

A. Very important part.

Mr. Fisk: Has the witness testified that there was a re-distillation plant at both Franciscan and—

Mr. La Shelle: Oh, no, I think off the record.

(Discussion off the record.)

(Testimony of Walter Del Tredici.)

Mr. La Shelle: Q. Was anything redistilled up there? A. Just on one occasion, yes.

(The last few questions and answers were read by the reporter.)

The Referee: For Identification, Petitioner's Exhibit Number 30, document entitled warehouse receipt number 3687-B, a pencilled memo, a check number 9447, in the amount of \$37.48, paid to the order of the Anglo California National Bank, signed by Schenley Distillers Corporation, W. E. Nauheim, appears to be W. E. Nauheim, Disbursement Account. Mr. Johnson, is that his name?

Mr. Johnson: Yes, that's right, the cashier.

The Referee: And a document entitled Schenley Distillers Corporation, Disbursement Account number 9947, sight draft, payment to Franciscan Farm and Livestock Co., [240] together with various other notations on them, and invoice number 299, entitled Franciscan Farm and Livestock Co., Yountville, California, Schenley Distillers Corporation, 10 barrels of spirit grain, with various other notations, \$375.48; also has a pencil notation, "Approved for payment", with a signature.

Another check in the amount of \$752.90, pay to the order of Anglo California National Bank, signed by Schenley Distillers Corporation, Disbursement Account, W. E. Nauheim.

Another document entitled Disbursement Account, Schenley Distillers Corporation, date April 9, 1948, check 12939, pay to the order of the Anglo California National Bank, sight draft payment to Fran-

(Testimony of Walter Del Tredici.)

ciscan Farm and Livestock Co., \$752.90, invoice number 301, Franciscan Farm and Livestock Co., addressed to Schenley Distillers Corporation, without address, 20 barrels of spirits grain, other notation, amounting to \$752.90, with a pencil notation, "Approved for payment", 4-7-48; and on both documents, the one heretofore referred and this one, appears to be the signature, Walter Del Tredici.

A check, Disbursement Account, pay to the order Anglo California National Bank, \$566.38, check 12938, signed Schenley Distillers Corporation, Disbursement Account, W. E. Nauheim.

Document entitled Schenley Distillers Corporation, number 9632, dated April 9, 1948, check number 12938, \$566.38, [241] pay to the order of Anglo California National Bank, sight draft, payment to Franciscan Farm and Livestock Co., \$566.38, also with other notations.

And, finally, invoice number 302 on the form of Franciscan Farm and Livestock Co., Yountville, California, to Schenley Distillers Corporation, 15 barrels of spirits grain, together with other notations, total \$566.38, pencil notation, "Approved for payment, 4-8-38", and the name Walter Del Tredici.

All those documents are marked Petitioner's Exhibit Number 30 for Identification.

Mr. Fisk: Off the record.

(Discussion off the record.)

The Referee: The warehouse receipt is dated December 27, 1948; the pencil memorandum has

(Testimony of Walter Del Tredici.)

various other entries, but it refers to check number 12879, 4-7-48.

The next document, the check is dated April 7, 1948. The next document is dated April 7, 1948. The next document, Invoice 299, is dated April 5, 1948. The next document, check \$752.90, is dated April 9, 1948. The next document referred to, with the sight draft notation, is dated April, 1948. The next document is invoice number 301, dated April 7, 1948. The next document is check in the sum of \$566.38, dated April 9, 1948. The next document is also on the same date, April 9, 1948, on the Disbursement Account, sight draft. And the last document, invoice number 302, dated April 7, 1948. [242]

Mr. La Shelle: Off the record, Mr. Fisk.

(Discussion off the record.)

Mr. La Shelle: Do you want to mark that other one, Judge?

The Referee: And the next group of documents will be marked for Identification, Petitioner's Exhibit 31 for Identification, consisting of the following documents:

Warehouse receipt number 3670-B, dated December 3, 1948, a pencil memo with the notation attached to W-R, number 3669-B. A check dated March 31, 1948, pay to the order of Anglo California National Bank. The amount of the check is \$3117.58, signed Schenley Distillers Corporation, Disbursement Account, W. E. Nauheim.

The next document, entitled number 9181, on Schenley Distillers Corporation form, Disbursement

(Testimony of Walter Del Tredici.)

Account, dated March 31, 1948, sight draft payment to Hedgeside Distillery Corporation, \$3117.58, together with other notations.

Invoice number 1215, dated March 29, 1948, on the form of Hedgeside Distillery Corporation, sold to Schenley Distillers Corporation, the amount \$3117.58, pencil notation "Approved for payment, 3-29-48", Walter Del Tredici, and there are other notations on the document.

A check dated December 29, 1947, in the amount of \$2484.73, pay to the order of Anglo California National Bank, signed Schenley Distillers Corporation, Disbursement Account; the signature cannot be made out by the Court, although it [243] appears to be "R. V." something.

The next document is on the form of Schenley Distillers Corporation, Disbursement Account number 4807, pay \$2484.73 to the order of Anglo California National Bank, sight draft payment to Hedgeside Distillery Corporation, same amount, various other notations on the document.

And the final invoice, number 1139, dated December 22, 1947, on the form Hedgeside Distillery Corporation, sold to Schenley Distillers Corporation 70 barrels spirits grain, \$2484.73, various other types and other notations appear on the invoice, and the pencil notation, "Approved for payment, 12-22-47, Walter Del Tredici".

All of those documents will be Petitioner's Exhibit Number 31 for Identification.

Mr. La Shelle: Q. Now, with reference to the

(Testimony of Walter Del Tredici.)

barreling of the production up there, that you passed upon, who furnished the barrels?

A. We did—Schenley Distillers Corporation.

Q. They furnished the barrels? A. Yes.

Q. And with reference to the Franciscan production and the Hedgeside production, you stated you worked at both plants? A. That's right.

Q. And with reference to the serial numbers of those two different plants, the registered distillers is the A.T.U. name for them, were you familiar with those serial numbers? And how they ran?

A. Yes. [244]

Q. And what sequence of numbers did the Franciscan run?

A. They were in four digit barrel—serial numbers were in four digit numbers.

Q. And how about Hedgeside?

A. They ran in five digit numbers.

Q. Now, after you okayed the invoice as you have told us, you didn't send those invoices down to Schenley, yourself, did you? A. No, I didn't.

Q. What did you do with them?

A. The girl—I just gave them back to the girl and she forwarded them to the necessary individuals in Schenley's.

Mr. Walsh: May I ask what girl you are talking about?

The Referee: Mr. Tredici, Mr. Walsh asked you a question.

Mr. Walsh: What girl do you have reference to when you say "the girl"?

(Testimony of Walter Del Tredici.)

The Witness: Pardon?

Mr. Walsh: Read the statement to him.

(The last answer was read by the reporter.)

The Witness: Well, I just happened to know they sent them to Mr. Baglin.

The Referee: No, Mr. Walsh's question is, when your answer said "the girl", he wants to know who is the girl.

The Witness: Well, she was the receptionist girl us there.

Mr. Walsh: Up where?

The Witness: Up at Hedgeside Distillery Corporation. [245]

The Referee: Do you know her name?

A. I am trying to think now; I don't recall her now.

Mr. Fisk: Q. The same girl in each case?

A. Pardon?

Q. The same girl in each case?

A. If she was there, mostly, yes.

Q. Well, I say, the same girl in the case of Franciscan as well as Hedgeside?

A. That's right.

Mr. La Shelle: Well, as long as you fellows are cross examining, you might as well go ahead. I'm through.

Mr. Walsh: We don't want to leave it up in the air. Are you all through now?

Mr. La Shelle: Yes.

Mr. Fisk: Are you only putting in these two in-

(Testimony of Walter Del Tredici.)

voices, or are you going to expect other warehouse receipts to go in through this witness?

Mr. La Shelle: Oh no, I am going to put on the warehouse receipts through Mr. Johnson. If I may ask another question:

Q. You had nothing to do with the warehouse receipts? A. No, I didn't.

Mr. Fisk: Off the record.

(Discussion off the record.)

Cross Examination

Mr. Fisk: Q. Mr. Del Tredici, I figured you spent your [246] time partly at the plant of Hedge-side and partly at the plant of Franciscan, did you not? A. That's right.

Q. Were they both operating at the same time?

A. That's right.

Q. And did Schenley have production contracts with each of them at that time?

A. I think they did.

Q. Did Franciscan—strike that out. The Franciscan production plant was commonly known as Mountain View, was it not? A. Yes.

Q. Did Franciscan operate an Internal Revenue Bonded Warehouse at that time? A. Yes.

Q. They did?

A. (Witness nods affirmatively.)

The Referee: Just a minute, Mr. Del Tredici, the court reporter doesn't get the nod.

The Witness: Oh, I'm awfully sorry.

The Referee: The answer?

(Testimony of Walter Del Tredici.)

The Witness: Yes.

Mr. Fisk: Q. Hedgeside was also operating an Internal Bonded Warehouse, was it not?

A. Yes.

Q. Was the production of Mountain View stored at the Internal Revenue Bonded Warehouse at Hedgeside?

A. Sometimes; on several occasions.

Q. Well, wasn't it usually stored there during that period you were there? [247]

A. Well, as far as I can remember, the Mountain View didn't have an I.R.B.W. qualified, and until it was qualified they stored it at Hedgeside.

Q. So during this period you were there, all of this production was stored at the Hedgeside Internal Revenue Bonded Warehouse, is that right?

A. Yes, until the I.R.B.W. at Mountain View was qualified.

Q. And was it qualified during the time you were there? A. Yes.

Q. Do you recall when you were qualified?

A. No, I don't.

Q. Now, you took your samples of specimens that you made your chemical analysis from, from the cistern room, you say?

A. From the receiving tanks in the receiving room.

Q. From the receiving tanks in the receiving room. And that is located at the distillery, is that right? A. Yes.

(Testimony of Walter Del Tredici.)

Q. Would you sample each day's productions?

A. Yes.

Q. You would only make one sample—Strike that out. Was there only one tank there to cover one day's production? A. No.

Q. So that each day you would make a chemical analysis of the day's production, which was contained in a tank located at the Distillery, is that right? A. Yes. [248]

Q. Was the production always barrelled on the same day it was produced? A. No.

Q. How much time lapsed between the production and the barrelling?

A. Well, if it all happened on a weekend, why, there would be from 24 to maybe 48 hours.

Q. Was the Government gauger there at all times when this production was taking place?

A. Yes.

Q. And the Government gauger marked each of the barrels or containers as the production was taken out of the tanks, is that right?

A. Well, the gauger didn't mark the barrels.

Q. Well, he supervised the marking, is that right? A. Yes.

Q. An employee of Hedgeside in each case marked the barrels, is that right? A. Yes.

Q. Where is the cistern room located?

A. Which place?

Q. Either place.

A. In Hedgeside, the cistern room is located right next to the I.R.B.W.

(Testimony of Walter Del Tredici.)

Q. In the same building, is that right?

A. Yes.

Q. What was the case at Mountain View?

A. It was in the—at Mountain View it was located in the Distillery Building.

Q. Now, I show you Petitioner's Exhibit for Identification [249] 3670-B, the first document in that Exhibit, which is warehouse receipt, Hedgeside warehouse receipt number 3670-B, dated December 3, 1948; looking at that warehouse receipt, can you tell me— Strike that out. That warehouse receipt has reference to 145 barrels of spirits grain, has it not?

Mr. La Shelle: Just a minute, Your Honor, if I may object to that question as not being proper cross examination. While these are all clipped together for convenience, this set I have only examined on the invoice. He has stated on direct he knows nothing about the warehouse receipt in question. It is not proper cross examination.

Mr. Fisk: Well, Your Honor, I submit——

The Referee: Wait a minute, gentlemen, before you go on with that. Mr. Fisk, when you were asking the question, I don't believe the record has the Exhibit. The Exhibit that is being referred to now, on the basis of the objection is Petitioner's Exhibit 31. I think Mr. Fisk's statement was——

Mr. Fisk: 30. I made a mistake. I have 30 in my hand. I meant to say 31.

The Referee: You are referring to 31 for Identification, Mr. Fisk?

(Testimony of Walter Del Tredici.)

Mr. Fisk: Yes.

The Referee: Now, Mr. La Shelle, you make your—

Mr. La Shelle: The objection is this, Your Honor: While these are clipped together as all supporting documents, [250] for convenience's sake for the record, for the later introduction in evidence, the only thing that this man was examined on was the invoice, what he did with the invoice and his approval. He has stated on direct examination that he had nothing to do with the warehouse receipts. He gave the invoice back, and that was the end of it. Now, he is being cross examined on the warehouse receipts, which is not proper cross examination.

Mr. Fisk: Your Honor, this is preliminary in the first place, and in the second place I see no point in putting all these documents up before the Court and before the witness if all he is testifying to is the invoice. Obviously, they are there for a purpose.

Mr. La Shelle: No, they are not.

Mr. Fisk: Counsel wants to show the connection between the documents.

The Referee: Objection sustained.

Mr. Fisk: Q. Take a single day's production, Mr. Tredici, or take any particular day; at what time of the day did you usually, or just mechanically how did you receive your sample that you made your chemical analysis of?

A. Well, when I reported to work in the morn-

(Testimony of Walter Del Tredici.)

ing, generally they had the sample taken from the tank.

Q. That is, a Hedgeside employee took the sample? A. Yes.

Q. And he had it in a container, such as a bottle, I see? [251] A. Four ounce bottle.

Q. And did he have that bottle labelled?

A. Yes.

Q. And so he just simply just turned that bottle over to you, and you made a chemical analysis of the contents, is that right? A. Yes.

Q. Now, did you personally do anything with respect to the contents of the—what you call the concentration tank; what is the tank that they store the production in at the end of the distillation before it's barrelled? A. The receiving tank.

Q. The receiving tank.

A. What was your question?

Q. Did you, personally, do anything with respect to the contents of the receiving tank, or did you just take this sample and analyze it?

A. Just take the sample.

Q. You had nothing to do with the mechanics of barreling the production? A. No.

Q. Nor did you supervise that?

A. I supervised it to make sure that it went into barrel and into drum.

Q. I see. As I understand it, if it was for redistillation, it went into a metal drum? A. Yes.

Q. If it were for beverage purposes, it went into an oak barrel for ageing? A. Yes. [252]

(Testimony of Walter Del Tredici.)

Q. Take a single day's production. In the morning you came in and got your sample, and with respect to that time, when would the contents of the receiving tank be barreled?

A. Well, it could—sometimes it would be barrelled in the afternoon if it was still on hand in the receiving tank. It would take an hour for me to make a test; and if I okayed it, it would take another hour to pump it into the cistern room.

Q. Would Hedgeside hold up barreling it until you had made your chemical analysis?

A. Yes.

Q. After you had made your chemical analysis, why, they then pumped the production from the receiving tank up to the cistern room, and it was there barreled, is that right? A. Yes.

Q. Now, with respect to the time that you made this chemical analysis, when did you receive this invoice that you were testifying about?

A. Sometime at the end of the day when the barreling was completed.

Q. From whom did you receive the invoice in the case of Hedgeside?

A. From this girl; I just happen to remember her name is Helen Husted.

Q. All during that period, you received it from the same girl, except when she had a substitute because of not being there, or something of that kind; is that right? A. Yes. [253]

Q. And the same thing is true as to the invoice you received from Franciscan, is that right?

(Testimony of Walter Del Tredici.)

A. Yes.

Q. Were there any papers accompanying the invoice when you did receive it? A. No.

Q. In connection with your duties there, did you execute any other papers than approving these invoices? A. No.

Q. You did not. Did you keep any records of what you had done? A. Yes.

Q. What was the nature of the record you kept?

A. It was just merely a record, so that I could—so that I knew what I was signing.

Q. Now, the invoice was in six copies, I believe you said. A. Yes.

Q. That was all made out by the Hedgeside employees? A. Yes.

Q. Did you retain any of it? A. No.

Q. But there were carbons between them and your approval prepared on all six copies, is that right? A. Yes.

Q. You turned them back through the girl, and then she took care of the further processing of the invoices, is that right? A. Yes.

Q. You had nothing whatsoever to do with the payment of the invoice, did you?

A. Outside of signing the invoice, no. [254]

Q. In other words, you don't know whether or not they were paid, or how they were paid, or who paid them? A. No.

Q. Did you do anything with respect to the warehousing of the production?

A. To the warehousing?

(Testimony of Walter Del Tredici.)

Q. Yes. A. No.

Q. It was not a portion of your duties to determine where the production was warehoused, or when it was warehoused, or in whose name it was warehouse? A. No.

Q. Well, I assume, of course, that when you okayed these invoices, that this production was then property of Hedgeside, is that right?

Mr. La Shelle: Just a moment. We will object to that as calling for the witness's conclusion and opinion.

The Referee: Sustained.

Mr. Fisk: Q. Now, you have testified that Mountain View production consisted of four digits and Hedgeside of five digits. Will you look at the top document of Petitioner's Exhibit 31, which is warehouse receipt number 3670-B, and tell me whether you can testify from that what production is covered by that warehouse receipt.

A. This is covered by Hedgeside Distillery.

Q. In other words, that covers production of Hedgeside? A. That's right.

Q. What is the basis of your testimony? Will you explain it from looking at that document? [255]

A. From the barrel serial number range up—five digits.

The Referee: Pardon me, Mr. Fisk. Mr. Del Tredici, will you be so kind as to turn that document over? You are testifying with reference to Exhibit Number what?

The Witness: Thirty-one.

(Testimony of Walter Del Tredici.)

The Referee: For identification. Very well.

Mr. Fisk: Q. That is the warehouse receipt document in that Exhibit? A. Yes.

Q. Here I see the notation, "X Mountain View, I.R.B.W.—111". Does that have any significance to you in that connection?

A. What does it mean?

Q. I am asking you, does it have any significance to you, in connection with the identifying of the production?

A. No, it has nothing to do with the identity of the production.

Q. So far as you know?

A. So far as I know.

Q. Is it not true that invariably the production was barreled and warehoused before you okayed the invoice? A. Yes.

Mr. La Shelle: What was that? I didn't understand it. Read that question, will you?

(The last question was read by the reporter.)

Mr. La Shelle: I wonder if I can interrupt for just a moment.

The Referee: I was just going to wait until Mr. Fisk had finished, because regardless of the answer, the Court [256] certainly sometime will have to be in a position to decide this matter, and I think at the moment I have two answers that don't coincide with one another. But you may continue, Mr. Fisk.

Mr. Fisk: I want to ask a couple of other questions.

(Testimony of Walter Del Tredici.)

Q. How far was the Mountain View Distillery located from the Hedgeside Distillery?

A. About ten miles.

Q. Was the production of Mountain View conveyed from the receiving tanks to the receiving room in the same manner as it was at Hedgeside?

A. No.

Q. At Hedgeside, the Distillery was at one side of the property, and the Internal Revenue Bonded Warehouse Number 2 on the other side, was it not—over the hill? A. Yes.

Q. And the receiving tank at the Distillery was piped through the warehouse, is that right?

A. The question is a little misleading. You are speaking of Hedgeside now, aren't you?

Q. Yes, I am talking of Hedgeside.

A. They went from the receiving tank into the cistern tank.

Q. And the cistern tank was located in the cistern room, which was in the Internal Revenue Bonded Warehouse, is that right? A. Yes.

Q. Even though it was several hundred yards apart? A. Yes. [257]

Q. And the production was conveyed there by pump through pipe lines, is that right?

A. Yes.

Q. Now, how was the same matter handled in the case of Mountain View?

A. At Mountain View, it went direct from the still into the receiving tank, and that's as far as it went. From there, it went into the barrels.

(Testimony of Walter Del Tredici.)

Q. And was the production of Mountain View barreled at the Mountain View premises?

A. Yes.

Q. And I take it, then, your so-called cistern room, in the case of Mountain View, was right at the still, is that right? A. Yes.

Q. And then, in the case of Mountain View, after barreling the production, it was then transported by truck over to Internal Revenue Bonded Warehouse Number 2 of Hedgeside, is that right?

A. Not all cases.

Q. Well, that was the usual case?

A. Yes, the usual case, yes.

Q. That was the situation, whether the production was barreled as a beverage in an oak barrel or in a metal drum for other purposes?

A. Yes.

Q. Was it your duty to make this inspection in the case of all of the purchases by Schenley of Hedgeside and Franciscan, or only the production purchased under their contracts?

A. Only the production.

Q. Purchased under their contracts?

A. Yes. [258]

Q. They are term contracts, we will call them?

A. Yes.

The Referee: Wait a minute; what did you say? All of their production?

The Witness: Yes, all of their production.

The Referee: Then, what you mean, you mean

(Testimony of Walter Del Tredici.)

all of their production, or just the production under the contracts?

A. The production under the current contract that I was sent up for.

Mr. Fisk: Q. In other words, an isolated transaction you went there to inspect material in that case? A. No.

Q. Do you know who made out the invoice?

A. This one in Hedgeside office, Helen Husted.

Q. She made them all out, is that correct, with possibly one or two exceptions?

A. Well, maybe I should explain that more. Mr. McMains would compute, and Helen Husted did the typing of the invoice.

Q. Now, who is Mr. McMains?

A. The Secretary of the Hedgeside Distillery Corporation.

Q. And he had an office there, at Hedgeside?

A. Yes.

Q. And were all of Franciscan books kept there at Hedgeside, as far as you know?

A. As far as I know.

Q. Now, Mr. R. I. Stone, do you know him?

A. Yes. [259]

Q. Did you have any dealings with him, in connection with the approval of these invoices?

A. Yes.

Q. Well, generally speaking, what were your dealings with him in connection with these invoices?

A. I told him the results of my chemical tests each day. I approved the samples or rejected them.

(Testimony of Walter Del Tredici.)

Q. In every instance, you would tell Mr. Stone the results of your tests?

A. Yes. Either Mr. Stone or Mr. Robert.

Q. Did you give Mr. Stone or Mr. Robert any written statement of your findings? A. Yes.

Q. In what form?

A. It took the form of that lot number so-and-so, and such a tank was approved for beverage purposes or for redistillation.

Q. And you signed that document?

A. Yes.

Q. And you turned it over to Mr. Stone and Mr. Robert? A. Yes.

Q. Did you keep a copy? A. Yes.

Q. In each instance? A. Yes.

Q. Did you give any record of any kind to the Government gauger? A. No.

Q. Did you have any dealings with the Government gauger at all—business dealings, I mean?

A. No.

Q. You stated that Mountain View's serial numbers ran in four digits, and Hedgeside's in five digits. You, of course, had reference to the period you were there in those [260] respective places, is that right? A. Yes.

Q. As a matter of fact, each one of them commenced with the serial number 1, isn't that correct?

A. Yes.

Q. The reason for the difference in the number of digits in this case was that the production of one

(Testimony of Walter Del Tredici.)

of them had gone along a great deal further than the other one had, is that right?

A. Well, I'm in no position to answer that. I wouldn't know the answer.

Q. Well, don't you know from your experience in the business that you're in that a Distillery starts with the numeral 1 and keeps going on up numerically as long as it produces in barrels, spirits?

A. Yes.

Mr. La Shelle: Just a moment. I'll object to that, Your Honor, as being argumentative, and he has also answered the question, and the question as to why one got ahead of the other is an argumentative question.

The Referee: Sustained. He said he wasn't in any position to know.

Mr. Fisk: Well, Your Honor, I recognize the Court has ruled on that, but I think, if I understand correctly the witness' testimony in the records appears that all of the serial numbers and the production of Mountain View are in four digits. That is not true. And all of the Hedgeside in five digits; that isn't true.

Mr. La Shelle: Now are you testifying, Mr. Fisk? [261]

The Referee: Wait a minute, Mr. La Shelle.

(The last question was read by the reporter.)

Mr. Fisk: May I ask this question? I'll go at it this way:

Q. Do you know whether or not the production

(Testimony of Walter Del Tredici.)

of Hedgeside has always been designated by five digits?

A. They were five digits when I started to work up there; they were in the five digit bracket.

Q. And they were when you left? A. Yes.

Q. But that's the only period you know about?

A. That's right.

Q. You have no personal knowledge of the manner or the reason behind placing serial numbers on barrels of spirits, have you?

A. Will you repeat that question again?

(The last question was read by the reporter.)

A. No.

Mr. Fisk: Your Honor, that is all that I have at this time. If the Court is not going to run much longer, I would like to, upon a further examination of these two Exhibits against the schedules—I haven't been able to jibe it in with the schedules here; I might want to pursue my examination a little further.

Mr. La Shelle: Well, I just don't see. This witness was put on essentially, Your Honor, about the invoices, nothing to do with any of those other Exhibits that are [262] clipped together only for convenience purposes. He doesn't know anything about the warehouse receipts, he doesn't know anything about the payments, he doesn't know anything other than what he approves on those invoices. I just don't see the necessity of his coming down here. I mean, after all, we can't interrupt everybody, just to wait around to be witnesses.

(Testimony of Walter Del Tredici.)

The Referee: Before I answer that, so the Court will have this matter clear, you stated that in some instances, or in most instances, the invoices were made out after the whisky had already been barrelled in oak barrels and steel barrels, is that correct? The Witness: Yes.

The Referee: Now, was some written document made by you, prior to that time? A. Yes.

Q. That would indicate into which barrels the particular whisky would go? A. Yes.

The Referee: Very well. Now, on this other matter, Mr. Fisk, did you want to pursue that further?

Mr. Fisk: Well, I certainly want to examine the witness further, based on that, because he just a moment ago said that there were documents that he signed up there.

The Referee: Well, that's the reason the Court asked him that particular question, because, after all, if I'm going to have two different answers, I am not going to guess at it, [263] if I have an opportunity to clarify it, and that's the reason the Court asked the questions.

Mr. Walsh: He testified very definitely, Your Honor, he never executed any other papers.

Mr. Fisk: That's right.

The Referee: Mr. Walsh, unequivocally, as far as the Court is concerned, I never in the world would have asked the witness the question, unless I heard with my own ears two different answers. That's the reason I asked him the questions. Well, in any event, Mr. Fisk, you will not be precluded from fur-

(Testimony of Walter Del Tredici.)

ther examination; in the event that you feel that you can dispose of the matter this evening, the Court with the permission of the court reporter will go on further. I would like to cooperate with the witness. I would prefer not to bring him back here again, if we are only going to be here a short time.

Mr. La Shelle: I would like to point out, Your Honor, that this witness was only examined with reference to that invoice of that Exhibit. He was not examined as to any of those other papers, and I only mark them all for Identification because they're clipped together, and for no other purpose in this case; and I just didn't want to upset my accountant. He was not examined on any of those other papers, and he has disclaimed any knowledge of the warehouse receipts or other papers after he signed the papers.

The Referee: Yes, but Mr. La Shelle,—he did testify [264] that in making his chemical analyses it was up to him to decide as to whether or not the whisky would go into the oak barrels or the steel drums, isn't that true?

The Witness: Yes.

Mr. Fisk: And both the testimony and the warehouse receipts show that it was warehoused before he signed the invoice.

Mr. La Shelle: I would like to ask a few questions on that.

The Referee: Now, wait a minute, gentlemen.

Mr. Walsh: This is cross examination.

The Referee: The first thing that we are going to

(Testimony of Walter Del Tredici.)

decide is whether or not we are going to adjourn now and whether we are going to have quite a lengthy examination with this present witness—cross examination; the Court is going to adjourn.

Mr. Walsh: Well, Your Honor, I haven't started my cross examination yet.

The Referee: Mr. Walsh, that's the reason I am stating that. Mr. Fisk said he had nothing further until the Court asked the questions and then changed the impression. But, in any event, Mr. Fisk, are you in position to say how much time you will need with the present witness who is on the stand?

Mr. Fisk: I am not in a position because I am very much puzzled on the witness' testimony, and it is coupled with the fact that I am not making an objection on this, [265] because Mr. La Shelle has been exceedingly courteous to me. This witness' testimony has got to dovetail, or I take it is intended to dovetail, into something else, and on such short notice I haven't had an opportunity to really get into what the purpose of the testimony is. Now, I don't think—I think, in view of the late hour, I don't see how anyone is going to be——

Mr. La Shelle: The main purpose of this testimony is simply to show that he approved these invoices and that the goods were accepted by Schenley under the contract at that time. That's its main purpose.

Mr. Walsh: Mr. La Shelle, in your direct examination you have opened up a course of cross ex-

(Testimony of Walter Del Tredici.)

amination, which I intend to pursue, and I can't do it tonight.

Mr. La Shelle: I didn't know you had any cross examination.

Mr. Walsh: In other words, you put on a witness and we are entitled to properly cross examine.

Mr. La Shelle: However, there are a few questions I would like to ask.

Mr. Walsh: I submit, Your Honor, we are entitled to complete our cross examination before he asks anything on redirect.

Mr. La Shelle: Your Honor, I have been interrupted in my direct examination so many times by opposing Counsel here, that it is almost pathetic; and yet, if I want to ask [266] him a couple of questions now, I can't.

Mr. Walsh: Mr. La Shelle, you have ample opportunity when we finish our cross examination. Now, you know the Rules of Evidence as well as I do. When you finish your direct examination——

Mr. La Shelle: I'll remember that in the future.

Mr. Walsh: Let me finish, please.

Mr. La Shelle: It's discretionary with the Court.

Mr. Walsh: We are entitled to finish the cross examination before you commence your redirect.

Mr. La Shelle: I am submitting it to the Court.

The Referee: As far as the Court is concerned, Mr. La Shelle, I am going to permit you to ask, as you say, on or two questions. Mr. Walsh and Mr. Fisk will have ample opportunity to complete the cross examination of this witness on November 28,

(Testimony of Walter Del Tredici.)

commencing at 11:00 A. M., and when you complete the examination of the one or two questions that you are going to ask, we will adjourn for the day.

Mr. La Shelle: Q. Mr. Tredici, I notice you wearing an ear instrument, the way I do.

A. Yes.

Q. Do you have any difficulty in hearing with that at times? A. Yes.

Q. Now, my thoughts may be wrong here, but I was under the impression that you had testified, under my direct examination, that the okay was given before the barrelling, whether [267] you accepted or rejected? A. Yes.

Mr. Fisk: Well, Your Honor, this is redirect examination, and he is putting words in the witness' mouth.

The Referee: Gentlemen, even with the answer that the witness has given, it certainly is of no help to the Court. What I want to know is, referring to the two Exhibits, one of them marked Petitioner's Exhibit Number 30 for Identification, and the other one marked Petitioner's Exhibit Number 31 for Identification, one of the documents that is a part of the Exhibit in each case is an invoice with the pencil notation, "Approved for payment, Walter Del Tredici".

Now, this witness testified that the actual invoice was not typed out and approved by him until after the whiskey was in either the oak barrel or the steel drum. Is that correct? The Witness. Yes.

Mr. Walsh: Well, Your Honor, just look at the

(Testimony of Walter Del Tredici.)

invoice. You can tell that, without even asking the witness.

The Referee: I mean, that's his testimony.

Mr. Walsh: That's right.

The Referee: I don't think there is any misunderstanding about that.

Mr. Walsh: No.

The Referee: But you also testified, in answer to the Court's question that, other than this invoice with the pencil notation, "Approved for payment, Walter Del Tredici," you had indicated prior to this time whether the whisky should [268] go into the oak barrel or the steel drum.

The Witness: Yes.

The Referee: After you made your chemical analysis; is that true? A. Yes.

Q. And did you make an instrument in writing, signifying your decision as to where it should go?

A. Yes.

Q. Do you have such a document?

A. Into wooden or steel drums.

Q. I say, do you have such a document, a copy of it? A. Yes. I don't have it with me here.

Q. But you have the document? A. Yes.

Mr. Fisk: Could he produce it?

The Referee: I think that's the answer. And both Counsel are in the clear.

Mr. La Shelle: I just wanted to clear up that point.

The Referee: You will have to return Mr. Del Tredici for cross examination and probably redirect

(Testimony of Walter Del Tredici.)

examination, so you are instructed to return on Monday, November 28, at eleven A. M., and at that time to bring with you any further written documents that you made, yourself, with reference to your decision after your chemical analysis as to where the whisky should go. Do you understand that? The Witness: Yes.

Mr. La Shelle: Have you got those?

The Witness: I turned them over to Mr. Baglin.

Mr. La Shelle: Pardon me?

The Witness: I turned them over to Mr. Baglin.

Mr. La Shelle: In other words, they should be available.

Mr. Walsh: You kept a copy.

The Witness: Yes.

Mr. La Shelle: And the original would be in their possession some place?

The Witness: Yes.

Mr. La Shelle: Now, Mr. Fisk and Mr. Walsh, is there any other information to try and facilitate the hearing that you gentlemen are requesting now of this witness?

Mr. Fisk: I would like to have him produce at the next hearing any other written documents that he made in connection with those duties there.

The Referee: You understand that?

The Witness: I missed that first part, what he said.

The Referee: If you have any written documents pertaining to your duties at Hedgeside or Franciscan on the subject matter that is in litigation that

(Testimony of Walter Del Tredici.)

you actually made, yourself, other than the one that you said you would produce, you have them with you at that time. It will be up to Counsel on both sides to object as to whether or not they are admissible, but you have them with you.

The Witness: Yes.

Mr. La Shelle: If I may say so, that calls for a certain extent as to his opinion as to what is pertinent, [270] which is a little difficult for the witness, Your Honor.

The Referee: During the period that he was at Hedgeside and Franciscan, as a result of the contract, he said he was up there on this contract, isn't that true?

The Witness: Yes.

The Referee: All right. Now, the documents that he, himself, made, I am asking him to bring them with him. I am not saying that they are admissible. That's up to you and Counsel on the other side.

* * * * *

WALTER DEL TREDICI

having been previously sworn, resumed the witness stand.

The Referee: And let the record show that the Trustee has returned Exhibits Numbers 1 to 5. You may proceed, gentlemen.

Further Cross Examination

Mr. Fisk: Mr. Del Tredici, I believe at the close of the last session you had testified that you had proved—you testified in substance you had sent—can you hear me?

(Testimony of Walter Del Tredici.)

A. That's better now, when you raise your voice.

Mr. La Shelle: I might state, Mr. Fisk, Walter is a little deafer than I am.

Mr. Fisk: If you can't understand me, say so; I will welcome the interruption. At the last session, you testified in substance that you had—under the two production contracts that Schenley had with Franciscan and Hedgeside, you were located up at the Hedgeside plant, and that samples were given you each day, and you examined those samples, and you determined whether or not in your opinion the production was suitable for beverage purposes or redistillation, and that you were given by the receptionist at Hedgeside an invoice for the [274] production, and that you wrote in pencil, "Approved" or "Disapproved," on that invoice, and I believe that that invoice was in several copies. And you turned some of the copies over to your employer, and then some of the copies remained with Hedgeside. Now, you then testified that in answer to the question as to whether or not there were any written records that you had in your possession, that there were regarding your findings, that you would produce them this morning, and have you produced them? A. Yes sir.

Q. May I see them?

A. These are my written records. One is for Hedgeside, and the other one is Mountain View Distilleries.

Mr. La Shelle: Let the record show, Your Honor, that Mountain View is Franciscan. That's

(Testimony of Walter Del Tredici.)

the name under which the distillery was registered with the A. T. U., so that we can use the word Mountain View when it means Franciscan.

The Referee: Very well.

Mr. Fisk: Your Honor, pardon me while I look at this.

The Referee: Surely.

Mr. Fisk: Q. Mr. Del Tredici, the record that you have just handed me—file, purporting to be record made in connection with Hedgeside Distillery production, and one with respect to Mountain View, I note they are simply longhand pencil memos and they are just personal records that you made for your own use, or did you make them as a permanent record in [275] connection with the operations you were carrying on?

A. I made them as a permanent record.

Mr. La Shelle: May I suggest, Your Honor, just simply for the sake of the record, that those be marked for Identification, as long as they are being used?

Mr. Fisk: I have no objection.

The Referee: The folder containing the memos, with the heading on the folder “Analysis of spirits grain production by Hedgeside Distillery Corporation, Folder No. 2”, covers spirits now stored at I.R.B.W. Number 2, Napa, Petitioner’s Exhibit Number 32 for Identification.

And the folder, with the same identification, with the exception “Mountain View Distillery, Petitioner’s Exhibit Number 33 for Identification”.

(Testimony of Walter Del Tredici.)

Mr. Fisk: Q. These two folders, Petitioner's Exhibit Number 32 and 33 for Identification, they were made by you recently, were they not, the folders, themselves?

A. Yes, I just got them together recently.

Q. This folder was set up since the last hearing?

A. That is right.

Q. But the memos enclosed in the folder were made up at the time you made the inspection, is that right? A. Yes.

Q. Look at the top sheet on folder number 2, the top memorandum in that folder, which is headed October 25, 1947, and tell me what there is on that memorandum from which you can identify [276] the statements there as having been made in connection with Hedgeside production?

A. Oh, you mean this sheet here?

Q. Yes, the first sheet, which is headed October 29, 1947; what is there on that sheet which makes you recall that as referring to Hedgeside production?

A. Well, in this particular case, when I first started in here, I didn't put down the name of the producers, but I can identify it as Hedgeside production by the barrels, serial numbers—68747.

Q. That's your only method of identifying it, is that right? A. Yes.

Q. Now, I notice that is written on with a little different pencil. Was that notation made at the same time?

A. Well, I would like to explain this system of

(Testimony of Walter Del Tredici.)

approval that I did up at Mountain View and at Hedgeside.

Q. Well, first answer the question, then explain it.

A. Well, before I can explain it, I will have to go back and review, because I think there is a certain amount of confusion.

Q. Well, just a minute, did you get the last question? A. Yes, I did.

Q. Well, could you answer that question; was that made at the same time? A. No——

Q. It was not? A. This original——

The Referee: Mr. Del Tredici, Mr. Fisk wants to know [277] whether or not it was made at the same time. Then you can explain.

The Witness: Well, no. I made this after it was barrelled down. I got this information——

Mr. Fisk: Q. Is that the body of it, which appears to be in a dark pencil; when was that written by you?

A. October 25, 1947, this dark part of the approval.

Q. 25 or 29? A. That says "25".

Q. Then, the pencil notation down in the lower lefthand corner, which contains the serial numbers, when was that written, according to your recollection?

A. I can't tell you right now. It could be on the same day, or maybe they barrelled it the following day after this approval.

Q. It was made subsequent——

(Testimony of Walter Del Tredici.)

Mr. La Shelle: Just a moment; the witness wanted to explain something with reference to that. He was told to explain it after he answered the question. I think he now has a right to give that explanation.

Mr. Fisk: All right.

The Witness: I would like to explain the whole—well, my first approval was when I received the samples, and I made a test, and then the approval was to earmark that production according to the sample, whether it should go into wooden or steel. Then, after it was barrelled down, the invoice was made out, which I approved, and that approval, the second approval, was merely a ratification of the original earmarking [278] of the production.

Mr. Fisk: Q. Now, when you speak of the second approval, what approval do you have reference to?

A. To the invoice that was prepared.

Q. What is the first approval?

A. The earmarking of the production, telling Hedgeside or Franciscan what to do with that production—into wood or steel.

Q. Well, you used the term “earmarking”. How do you earmark the production? Just mechanically, what do you do to earmark it?

A. Just tell them what type of containers to put that product into.

Q. In other words, a sample was handed you and you examined the sample and you determined from the examination of the sample whether it was to be

(Testimony of Walter Del Tredici.)

used for beverage purposes or redistillation, and you so advised an employee of Hedgeside, is that right? A. Yes.

Q. And that's all you did until you later approved the invoice, is that right?

A. Later approved the invoice.

Q. And that's what you mean by "earmarking"?

A. Yes, sir.

Q. Well, now, turn to the second memo sheet in this folder, Petitioner's 31.

The Referee: 32.

Mr. Fisk: 32, excuse me.

Q. What is there on that sheet, from which you can identify it as Hedgeside production? [279]

A. Well, I identified it by the lot number, which I assigned. It happened to be lot 105—on lot 105 on the approval.

Q. Where did the designation lot 105 come from? Is that Schenley's designation?

A. Hedgeside's designation. We used it merely as a matter of identification.

Q. Hedgeside, when they handed you a sample, they identified it as lot 105, is that correct?

A. Yes.

Q. That was written on the sample, I take it?

A. Not at all times, though. It so happened that I knew the continuity of the lot numbers, so if they left it off the bottle, I knew that it was lot number so-and-so.

Q. Does the continuity of the lot number have

(Testimony of Walter Del Tredici.)

reference to dealings with Schenley only, or all production of Hedgeside?

A. Well, I'm only interested where it dealt with Schenley's product.

Q. So the lot numbers were lot numbers that Hedgeside used in conjunction with Schenley transactions only?

A. All I know is that we used the lot numbers with the Schenley goods. I don't know what they did with the other lot numbers if they had any.

Q. Well, Mr. Del Tredici, you have said that sometimes the sample had one lot number on it, but you placed the next consecutive number in order. Now, having to do with all of the customers of Hedgeside, how did you know what the next in order would be?

A. I merely asked the Superintendent. [280]

Q. Then, you want to change your statement that you changed the numbers, is that right?

A. Don't you understand, Mr. Fisk, when you are stationed at a distillery, you are more or less familiar with the operation, and it's a continuous production and as each lot is being produced we just get a number right following each other.

Q. Well, in other words, during this period you were there, Schenley bought all of the production of Hedgeside and Franciscan, is that right?

A. That's right.

Q. Now, I noticed in the first memorandum referred to you this morning, you have a statement, "This acceptance is subject to Mr. Donnelly's and

(Testimony of Walter Del Tredici.)

Mr. Woolsey's approval". Then, I take it, your approval of these invoices was not final.

A. Only in those cases where the product did not meet the contract standard, I was able to exercise judgment on some lots that were on the borderline cases.

Q. But there had to be a further approval and acceptance by Hedgeside before Hedgeside would accept the production under their contract.

(Witness nods negatively.)

Mr. La Shelle: I'll object to that question as calling for the conclusion of the witness as to the conclusion of a contract.

The Referee: You can reframe the question, Mr. Fisk.

Mr. Fisk: Q. What do you mean by the statement you [281] have written on your memorandum, "This acceptance is subject to Mr. Donnelly's and Mr. Woolsey's approval"?

A. I meant by that, that I okayed the production and a sample was sent to our San Francisco office, where Mr. Donnelly tested it, and if he disagreed with my findings he could then override my approval.

Q. I see. And that was the understanding——

A. That was the understanding.

Q. (Continuing): ——between the parties. As a matter of fact, Schenley did throw out some of this that you had accepted, did it not?

A. Well, I don't know. Later on—they didn't tell me what they did afterwards.

(Testimony of Walter Del Tredici.)

Q. Now, is it your recollection that during the period that you have testified to here, when you were up at Hedgeside——

A. Speak a little louder, please.

Q. During the period you were at Hedgeside, the lot numbers started with lot 1 and ran consecutively on up into 100 or more during that period?

A. No. We started off, I think it was lot 105, and I am not quite positive. I don't know what was the first lot number. It was a lot number given to me by Hedgeside. I don't recall which was the first lot number we used.

Q. And what was done in the case of Mountain View? Did Hedgeside give you the number there, too?

A. Hedgeside didn't give me any number for Mountain View.

Q. Well, who gave you the number? [282]

A. Mountain View gave me the number.

Q. And who——what individual?

A. Mr. Laurentzen.

Q. Mr. Laurentzen gave you the lot number in each instance where you were examining production of Hedgeside, is that right?

Mr. La Shelle: Just a moment. I will object——

The Referee: He said Mountain View.

Mr. La Shelle: ——as assuming something not in Evidence.

Mr. Fisk: Q. Mountain View, excuse me. Is that right?

A. Well, I'd like to explain, Mr. Fisk——

(Testimony of Walter Del Tredici.)

Q. Well, can you answer that question first?

A. Yes, but he did not actually give it to me. I mean, it was going to take—we were taking all their production, so each lot took the corresponding number following each other. It was automatic.

Q. Well, did you get the number from anyone else in connection with Mountain View production, from anyone other than Laurentzen?

A. No.

Q. You have no present recollection about the lot numbers themselves, except that in the case of Mountain View you got lot numbers from Laurentzen, and in the case of Hedgeside who gave you the lot numbers?

A. Henry Robert.

Q. That's the only recollection you presently have in that connection?

A. That's right.

Q. Now, looking at Petitioner's folder 2, and Petitioner's for [283] Identification 33, look at the top memorandum there and tell me how you know that has reference to Mountain View.

A. Well, first of all, by the serial number range. Then up here it says, "Lot 8, Mountain View".

Q. Take the next sheet.

A. This is the analysis sheet. Lot 8.

Q. In other words, in the case of Hedgeside, you have a lot number but no designation of Hedgeside. But in the case of Mountain View, you had a lot number but also a designation of Mountain View, is that right?

A. No.

Q. Well, what is right?

A. In Mountain View—in Hedgeside, the first

(Testimony of Walter Del Tredici.)

few approvals, when we got organized and after we got organized I designated the producer on each and every approval.

Q. After you made out the memoranda, what did you do with them?

A. I forwarded the original to Mr. Laurentzen in the case of Franciscan, and to Mr. Robert at Hedgeside.

Q. Well, some of them appear to be originals here. Take the first one in Petitioner's 33; isn't that an original?

A. In the beginning, when we first started in, there was—everything was new, and we didn't formulate any regular procedure. In this particular case, in lot 8, probably gave verbal okay there until we got started in writing the necessary approvals, which began with lot number 11.

Q. Well, in other words, in the very beginning, they weren't [284] particularly accurate, is that right?

A. I wouldn't say they weren't particularly accurate. We knew what we were doing up there at all times.

Q. You mean, Schenley knew what it was doing?

Mr. La Shelle: I object to that question, Your Honor, upon the grounds it is argumentative.

The Referee: Yes.

Mr. Fisk: Well, I don't think it is at all. He said, "We".

The Referee: He has answered it.

Mr. Fisk: Q. Now, these two sheets of written

(Testimony of Walter Del Tredici.)

memoranda, plus the written approval you made on the invoices, are the only records you kept in connection with your work at Napa?

A. Well, I had some weekly letters. Each week I wrote a weekly letter to Mr. Baglin, listing all the approvals. This starts with October, 1947, and goes on through to May, 1948. And if you want me to explain these letters——

Q. Wait just a minute, let me look at them.

Mr. La Shelle: I think we should have those marked for Identification, Your Honor, if Counsel is going to use them.

Mr. Fisk: Well, I don't know if I am going to use them yet.

The Referee: He is going to look at them first, Mr. La Shelle. Maybe he won't use them.

Mr. Fisk: Q. The correspondence that you have just [285] handed me, a great deal of which is not correspondence, that you are the author of, there are no other records that you have in connection with your operations at Hedgeside, are there?

A. No, those are the only records I have—the weekly letters and the approvals of the production.

Q. Mr. Del Tredici, you may have covered this, but if you have, it won't hurt to go over it again. The first operation on your part——

Mr. La Shelle: I take it, you are not interested in those inter-office records.

Mr. Fisk: No.

Q. The first operation on your part at Hedgeside was to accept a sample, and I believe you said, usually in the morning? A. Yes.

(Testimony of Walter Del Tredici.)

Q. And to make a chemical analysis of it?

A. Yes.

Q. Then, that day's production went into the receiving tanks and was barrelled, and went up to the Internal Revenue Bonded Warehouse Number 2, and warehouse receipts were issued, and an invoice was made out by this receptionist of Hedge-side and turned over to you, and you marked "Approval" on it; is that correct?

Mr. La Shelle: Just a moment, Your Honor. I'll object to that question on the ground that it is compound and complex, and calls for about eight or nine different answers.

The Referee: Sustained. [286]

Mr. Fisk: Q. Well, after your chemical analysis, what happened to the production?

A. It was—after the analysis, I wrote out the approval, designating whether to put the production into wood or steel.

Q. Well, you wrote out that approval on what?

A. According to the evidence there in those folders.

Q. These little memoranda, is that right?

A. Yes.

Q. And that's the only place you made that indication? A. Yes.

Q. Then, after that, what took place?

A. Then, it was filled out in wood or steel, according to which direction I gave, and when that was finished then the invoice was prepared and which I approved.

(Testimony of Walter Del Tredici.)

Q. Just a minute. Let's take the case where the spirits or whisky or distilled materials were placed in oak barrels and gauged by the Government gauger in the cistern room. Now, where did you get your invoice with respect to that transaction?

A. From the receptionist in the Hedgeside office.

Q. And you got it after the whisky had been barrelled and placed in the warehouse, is that right?

A. Yes. May I explain—

Q. In other words, your receptionist did not know what the serial number was, or what the barrel was, until it had been placed in the barrel in the cistern room, which is in the warehouse, and then placed in the warehouse; is that right? [287]

Mr. La Shelle: Just a moment. I'll object to that question as calling for this witness' conclusion and opinion as to what Hedgeside's receptionist knew, which is locked up in her own mind, and it is also compound and complex, calling for five to ten answers.

The Referee: Sustained.

Mr. Fisk: Q. You said that usually in the morning you made your chemical analysis with respect to that production. When did you usually get the invoice?

A. Generally, Mr. Fisk, it was filled down the same day, and then I would get the invoice around 4:30 in the afternoon or 5, whichever—

Q. What do you mean by "filled down"?

A. When it's placed into oak barrels or steel drums—

(Testimony of Walter Del Tredici.)

Q. It was placed in oak barrels or steel drums during the day?

(Witness nods affirmatively.)

Q. And then the barrel was placed in the warehouse, is that correct? A. Yes.

Q. Or the steel drum, as the case may be, was placed in the warehouse? A. Yes.

Q. And when it was placed in the warehouse, a warehouse receipt was issued, is that right?

A. I had nothing to do with warehouse receipts. I know nothing about them. My job merely was to make the tests and designate the fill-down, whether it goes into wood or steel. After that, I had nothing to do with warehousing or warehouse receipts. [288]

Q. Well, in other words, you had nothing to do with the transactions, from the time you made your chemical analysis of the sample until the time you handed an invoice; is that right?

Mr. La Shelle: Just a moment, your Honor. I'll object to that question as calling for the witness' conclusion as to the part he played. He has testified as to what he did. What part he should play, is determined by the contract.

The Referee: He may answer. What did you do between the time you made your chemical analysis and the time you approved your invoice, if anything?

The Witness: Well, I saw to it that my instructions were carried out.

Mr. Fisk: Q. Well, what was it? What did you actually do?

(Testimony of Walter Del Tredici.)

A. Well, I just went to the cistern room and saw that if I told them to put into wood that it went into wood barrels, or if it was supposed to go into steel drums that it went into steel drums.

Q. In the case of Hedgeside, where was the cistern room located with respect to the Distillery?

A. It's part of the I.R.B.W. Number 2 over the hill, about 600 yards from the Distillery.

Q. And where was the chemical laboratory in which you made the chemical analysis?

A. In the Distillery.

Q. Down the hill?

A. Down the hill. [289]

Q. A quarter of a mile away from the cistern room, is that right? A. Just about.

Q. What would be a normal daily average day's production in gallons?

A. Well, that's a question that's quite difficult to answer.

Q. Well, give me an approximation.

A. It varies according to the type of material you use, and the condition of the steel——

Q. Well, take whisky.

A. I know nothing about whisky.

Q. Well, take grain spirits.

A. Well, if you want an approximate figure, it generally ran around 5,000 proof gallons.

Q. 5,000 proof gallons? A. Yes.

Q. How many gallons to a barrel or to a drum?

A. Well, we speak of wine gallons. Now, generally, about 50 wine gallons.

(Testimony of Walter Del Tredici.)

Q. About how long would it take?

Mr. La Shelle: May I interrupt a moment? Is the Court familiar with the difference between proof gallons and wine gallons?

The Referee: No.

Mr. La Shelle: Well, it's a very difficult thing sometimes to understand.

Mr. Fisk: Your Honor, he can explain that later. I don't think it's material here. [290]

The Referee: Go ahead.

Mr. Fisk: Q. How long would it take to place in barrels or drums 5,000 gallons?

A. It generally took from about six to eight hours.

Q. From six to eight hours? A. Yes.

Q. How long would it take you to make your chemical analysis?

A. Generally about an hour.

Q. So that you made your chemical analysis the first thing in the morning, and then the rest of the day you spent in the cistern room, is that correct?

A. No, I didn't spend it in the cistern room at all times.

Q. Isn't that where all the barreling took place?

A. Yes, but another function I had was order empty barrels up there, and I had to see that these barrels, so that they weren't rotted, and inspect the empty barrels to see that they were in good condition.

Q. Well, now, how did you check whether the samples you had made covered the spirits that were

(Testimony of Walter Del Tredici.)

going into these barrels and drums when you were in the cistern room?

A. I took what would be a check sample out of the cistern room.

Q. How did you do that?

A. Hedgeside had the necessary approval from A.T.U., and they secured the samples for me, and I just made a check on them to make sure that the right goods were pumped up to the cistern room.

Q. Well, you just periodically made a spot check, is that right?

A. Made a spot check, as a matter of caution.

Q. But you did not examine every gallon, every barrel of spirits that came in, and you didn't make a double check on whether or not it was the same as the sample that you had originally examined, did you?

A. Only from the tanks. I only would check the sample in the tanks, not in each barrel.

Q. Well, the tanks are located down at the Distillery?

A. Receiving tanks, yes.

Q. And those are the tanks you checked, you spot checked, is that right?

A. May I explain that a little more, Mr. Fisk?

Q. Well, will you answer the question first?

A. Yes.

Q. All right.

Mr. La Shelle: Now, give your explanation.

The Referee: Now, you can explain it.

A. Go ahead? Well, generally I would get the samples from the receiving tanks. I would make the

(Testimony of Walter Del Tredici.)

necessary tests, but at other times Hedgeside was in a hurry to push through production or to make room in their Distillery; they have limited storage space, so sometimes during the night they would complete a lot, pump it up into the cistern tank. On occasions like that I had to get my samples from the [292] cistern tank, or sometimes they would pump to lots to go into cistern tanks, so I would—

Mr. Fisk: Q. How large was the cistern tank—how many gallons approximately?

A. It was a steel tank. It ran around 15,000 wine gallons.

Q. In order to take a sample out of the cistern tank, did you have to get the Government's consent and tax pay it?

A. No. According to regulation of A.T.U., Hedgeside was allowed to take samples each day for analytical examination. Hedgeside had the necessary approval from the A.T.U. to withdraw daily samples.

Q. What about the withdrawal that you made in the cistern tank, who got that consent from the A.T.U.?

A. I didn't make that withdrawal; Hedgeside made it.

Q. So that every time you spot checked in the cistern tank, Hedgeside went up and made the withdrawal and got the consent of the Alcohol Tax Unit, is that right?

A. Hedgeside had the consent of the A.T.U. in the form of a letter, and it wasn't necessary to ask

(Testimony of Walter Del Tredici.)

their consent each time. I mean, the gaugers saw that Hedgeside had the letter of approval. That was good for——

Q. Didn't Hedgeside——

Mr. La Shelle: Just a minute, let him finish his answer.

The Referee: And that was good for what, Mr. Del Tredici? [293]

The Witness: (Continuing) ——for an indefinite period of time. It was a standing approval.

Mr. Fisk: Q. Is it necessary, under the rules and regulations of the Alcohol Tax Unit, that every time a sample is taken out by anyone that a record be made of the quantity removed, and that it be tax paid, and who removed it?

Mr. La Shelle: Your Honor, I think we are going far afield to have this witness testify as to what the A.T.U. rules apply for. He can testify as to what he knew or thought to do, according to the rules as he found them. I think we are going a little far afield.

Mr. Fisk: We are talking now about practices, Your Honor. This witness is very familiar. He has been in the liquor business for years, and the distillery business, and he knows quite a bit about what takes place around a distillery.

The Referee: Well, he can answer what he did, as far as taking the samples or what someone else did, or who took the samples. Just tell us what took place in this particular instance.

The Witness: Well, Your Honor, the Hedgeside employees always took the samples. They had the

(Testimony of Walter Del Tredici.)

approval. Schenley did not have the approval from the A.T.U. to withdraw the samples.

Mr. Fisk: Q. How many samples during the period you were at Hedgeside did you take from the cistern room?

A. I can't remember that now. [294]

Q. Well, an approximation?

A. It still is hard to answer that.

Q. Well, did you take 1,000, or did you take 10?

A. Oh, I would say approximately 150 samples.

Q. From the cistern room?

A. From the cistern room?

Q. Yes.

A. I can't tell you that. I don't remember at all now. I can't remember that.

Q. Well, as a matter of fact, you took very few, few, if any, from the cistern room, isn't that true?

A. Well, I took a number of them.

Q. But you can't recall the number?

A. No, I can't. I mean, I made no point to recall how many samples I took from the cistern tank or from the receiving tanks.

Q. Whom did you see connected with Hedgeside, for the purpose of getting a sample from the cistern tank?

A. The Superintendent, Henry Roberts.

Q. In each instance?

A. Pardon?

Q. In each instance?

A. Or his assistant. He had an assistant up there by the name of Laporì—Jules Laporì.

(Testimony of Walter Del Tredici.)

Q. And when you saw Henry Roberts, Henry Roberts would go up and get the sample from the cistern tank and turn it over to you, isn't that right?

A. No, he wouldn't take the sample himself, one of his [295] assistants or one of his boys did all the withdrawal of the samples. Mr. Roberts really was Superintendent, and he just gave the orders.

Q. Take the case where a sample was taken from the cistern tank, how did you check what barrels that sample had reference to—the contents of what barrels it had reference to?

A. I couldn't because it wasn't barreled down yet when it was in the cistern tank. It couldn't have information to any barrels at all.

Q. When you would spot check the cistern tank, would you hold up the barreling until you made your analysis?

A. Yes. I would like to explain that a little more. Sometimes, you know, in a distillery we produce lots of heads and tails, and we would have to pump it over the same pipe line that we produced the good spirits.

Mr. La Shelle: Did you say "heads and tails"?

The Referee: He means odds and ends, I assume.

The Witness: That's right, I assume. It's the beginning and end of the distillation period.

Mr. Walsh: Not odds and ends, your Honor. It is "heads and tails". That's the term that they use.

The Witness: Well, we use the same pipe line to pump up the heads and tails, and then that pipe line

(Testimony of Walter Del Tredici.)

would be contaminated, and when we follow through with more production it would often ruin a good batch that followed this head and tail, so to prevent that I made this check of the cistern tank. [296] I was put at Hedgeside to see that the spirits that I approved was in good shape when it got to the cistern tank, and on several occasions it was spoiled when it got to the cistern tank, and then I made the spirits go into steel drums instead of wooden barrels.

Mr. Fisk: Q. Now, take the case where you examined——

The Referee: Mr. Fisk, will you need a little more time?

Mr. Fisk: Just one question.

The Referee: All right.

Mr. Fisk: Q. When you spot checked the cistern tank and you found the contents not to be up to standard, what did you do?

A. I told them to put it into steel.

Q. You told them to put into steel?

A. Yes.

Q. And who did you tell to do that?

A. Mr. Robert.

Q. Then, what did you do with respect to notifying your Company?

A. Notifying my what?

Q. Your Company—Schenley.

A. It wasn't necessary to notify my Company, outside of those weekly letters indicating the ap-

(Testimony of Walter Del Tredici.)

proval of the invoices, and that contained all the necessary information.

Q. What was the purpose of your weekly letter?

A. As a matter of precaution, to make sure that those were [297] the only invoices to pay.

Q. In other words, until your weekly letter had gone through and been received by your superior with Schenley, no payment would be released by Schenley to Hedgeside, is that right?

A. No, I had nothing to do with that.

Mr. La Shelle: I will object to that question. The witness can't answer that.

Mr. Fisk: He stated the purpose of his weekly letter.

The Referee: You may answer.

The Witness: The only purpose, Mr. Baglin requested me to write these weekly letters, giving him my approval during that week, that's all I know about it.

Mr. Fisk: Q. Well, you just stated it was for the purpose of determining whether payment would be made.

A. Just—as he explained it to me, it was just a matter of caution.

Q. Caution for what?

A. I don't know.

Q. Well, as a matter of fact, you know that it was for the purpose of having Mr. Baglin determine whether or not they would accept the goods and pay for it, isn't it, isn't that true?

Mr. La Shelle: Just a moment. I will object to

(Testimony of Walter Del Tredici.)

that as calling for the witness' conclusion and opinion as to what Mr. Baglin had in mind.

The Referee: Overruled, you may answer.

The Witness: I don't know what Mr. Baglin had in mind. All I know is, he requested me to write these weekly letters, [298] giving him the approval of the invoices I made during the week.

Mr. Fisk: Q. And you wrote them?

A. I wrote them.

Mr. La Shelle: And those are the letters which were given to you, and which you gave back to the witness, that you were not interested in them.

Mr. Fisk: That's all. You can use it.

The Referee: Q. Mr. Del Tredici, I understand from the statement you made just before this last one, the last group of statements, that there were times when you in your original analysis had designated a batch to go into wood, and then after it had gone through these pipes where heads and tails had priorly gone into, that it was possible for you to direct and order it into steel, is that true?

A. That's right. I would like to explain that, because if I approved it as good spirits, go into wood and they contaminate the lot with too much fusel oil, well, Gee, I just couldn't accept it then.

Mr. Fisk: Just one question.

Q. Mr. Tredici, take a case where you in the morning analyzed whether it was fit for beverage purposes, when you examined the receiving tank and designated that it be placed in wooden barrels, it went up to the cistern tank and you spot checked

(Testimony of Walter Del Tredici.)

and determined that it was not suitable for oak barrels, and they went ahead and barreled it, anyway, in oak [299] barrels, what happened to that whisky?

Mr. La Shelle: Well, just a moment, your Honor. I'll object to that as a compound and complex question, and assuming something not in evidence.

The Referee: Ask him if that ever happened, first.

Mr. Fisk: Q. Did that ever occur?

A. Can you repeat that question? That was quite complicated.

Q. Let's take the case where you approved it in the morning, and in the afternoon you went up to check the cistern tank, and you found out it was unsuitable for beverage purposes and instructed them to put it into metal barrels instead of oak, but nevertheless they put it into oak barrels, what did Schenley do with respect to the contents of the oak barrels?

Mr. La Shelle: I make the same objection, your Honor, as assuming something not in evidence. Ask him if that ever occurred.

Mr. Fisk: Q. All right. Did that ever occur?

The Referee: Q. Did it ever happen, Mr. Del Tredici, that you had designated originally oak barrels, and then you made your spot check, and you then designated that it went into steel barrels, but prior to your making your spot check they had already started filling it into oak barrels; did that ever happen? A. No, it didn't.

Mr. La Shelle: This is a good time, your Honor.

The Referee: Two o'clock, gentlemen.

(Thereupon, the noon recess was taken.)

Afternoon Session—2:00 o'Clock p.m.

WALTER DEL TREDICI

previously sworn, resumed the witness stand, and testified further as follows:

Mr. Fisk: I have no more questions at this time.

Redirect Examination

Mr. La Shelle: Q. I notice that looking at Petitioner's Exhibit Number 32, which is the Hedgeside production, that the first bunch of notices for steel or wood, so to speak, are in longhand, and then later on they appear to be a mimeographed printed form; what was the reason for that?

A. What was the reason for what?

Q. The fact that the first number of them were in longhand, and later on you used a printed form?

A. Well, the reason for that was to save time and work, and it made a better record.

Q. I see. Now, with reference to the production of both Mountain View and Hedgeside, I want to show you Schedule "C"—Counsel, I might state for the record that those are all the Exhibits, we seem unable to find—it was introduced in the Opening Statement, so I have got an extra one here, which is exactly the same, which we could use, and on checking my record of Exhibits I find that for some reason or other, that only "A" and "B" were marked

(Testimony of Walter Del Tredici.)

for Identification, and I would like [301] to have these two marked for Identification, so that they are marked in the record.

The Referee: That has been marked "C", will be marked Petitioner's for Identification Number 34, entitled "Recapitulation of Schenley Distillers Corporation, purchases of spirits grain and whisky, carried and stored in I.R.B.W. Number 2 at Napa, California," and attached thereto are four pages entitled, "Summary of Schenley Distillers Corporation, purchases of spirits grain and whisky, produced by Franciscan Farm and Livestock Company, now carried in storage in I.R.B.W. Number 2 at Napa, California,"—refers to two pages, and the last two pages, "Summary of Schenley Distillers Corporation of spirits grain, produced by Hedge-side Distillery Corporation and now carried in storage in I.R.B.W. Number 2 at Napa, California," Petitioner's Number 34 for Identification.

Mr. La Shelle: Q. Now, referring again to Petitioner's Exhibit for Identification Number 32, and taking the first notice there, dated October 25, which Mr. Fisk asked you about, you will notice that there appears to be handwriting on there in two different pencils; one is heavy, as you have testified, and then, on the lefthand corner at the bottom is handwriting in obviously a lighter lead of pencil. Now, the lighter lead pencil down here at the bottom there, in the lower lefthand corner, is that your handwriting?

A. Yes.

(Testimony of Walter Del Tredici.)

Q. And the lighter handwriting, in which various numbers and [302] symbols appear, was that put on before or after the spirits were barrelled?

A. That handwriting was put after the spirits were barrelled.

Q. And does that handwriting, in the lighter lead, give the serial numbers of the barrels?

A. Yes.

Q. Now, since the last hearing, I requested you to check these various notices against the Schedule C, which is Petitioner's Exhibit for Identification Number 34; did you do that? A. Yes.

Q. Have you got the one that you checked with you? A. Yes.

Q. I'll show you a similar schedule for Identification in 34, in which on page 1, page 2, page 3, and page 4, there appear various red marks and crosses, and checks and crosses. Now, will you just tell the Court how you checked these notices in both Petitioner's Exhibit Number 32 for Identification, which is Mountain View—or 33, I should say, and 32 which is Hedgeside, and how you checked that against the Schedule to see if all the notices were there. A. Well, I checked—

Mr. Walsh: Just a minute, please. I am going to object to that question as incompetent, irrelevant and immaterial. The two documents speak for themselves; how he tested them is immaterial.

Mr. La Shelle: Will you talk a little louder? With my cold, I can't hear you. [303]

The Referee: Will you read that?

(Testimony of Walter Del Tredici.)

(The last statement of Mr. Walsh was read by the reporter.)

Mr. La Shelle: I think it is perfectly competent, and at the end this will all be connected up, but I can't do everything at once. In other words, in due course I will introduce supporting documents to support the schedule, don't you see, which will stand by themselves. This is done simply as an aid to the Court and Counsel to follow, and he has checked these against this (indicating), and later on I will prove that these check against the invoices, which is the same as his checking against the invoices. Do you follow me?

Mr. Fisk: Your Honor, I would like to join in Mr. Walsh's objection and make the further objection that this is not proper redirect examination. I don't want to be——

The Referee: Sustained.

Mr. La Shelle: Q. Walter, you mentioned this morning proof gallons and wine gallons. Will you just tell the Court briefly what that is—the difference?

A. The main difference is that a wine gallon is the measurement of liquid by physical volume, and the proof gallon is more or less a measurement of the alcoholic strength of the liquid, and to determine the proof gallons you always multiply the proof of the liquid, times the wine gallons; that gives you the proof gallons. I give you an example. You take fifty wine gallons [304] at 150 proof. That would be equivalent to 75 proof gallons—50 times 150.

(Testimony of Walter Del Tredici.)

Q. What would be the alcoholic content of—

The Referee: Just a minute.

Mr. Walsh: I don't get that. I am sorry, but I don't get that. 50 times 150 doesn't give you 75.

The Witness: Proof gallons—roughly speaking.

The Referee: Now, just a minute, gentlemen. Mr. Walsh, he is raising a point there. 50 times 150 give you 7500. He wants to know where you put those decimal points.

The Witness: Two places over.

The Referee: You'd better explain it in different language.

The Witness: Well—

The Referee: Did you call 100 the medium?

The Witness: That's right.

The Referee: 150 would be really 11½.

The Witness: That's right.

The Referee: Well, you haven't said that. Now, explain that again.

The Witness: 100 proof is the medium point. In other words, the wine gallon and proof gallon remain the same. Anything over 100 proof, then, the proof gallon becomes higher than the wine gallon.

Mr. Walsh: That's what I want you to state for the record. [305]

The Witness: Oh, I see. I'm sorry I didn't make that clear for you.

Mr. La Shelle: Q. Put it this way: A bottle of bond, 100 proof, how much alcohol has it got there by percentage?

(Testimony of Walter Del Tredici.)

The Referee: Q. Supposing you had 50 gallons, 100 proof, how much would you have?

A. 50 proof gallons.

Q. And if you had 150 gallons at 100 proof?

A. That's 150 proof gallons.

Mr. La Shelle: That's a point, that wine gallons and proof gallons is quite——

Mr. Fisk: Q. And if you had 100 gallons at 190 proof, how many proof gallons would you have?

A. 100 proof gallons.

Mr. La Shelle: I think that's all, Walter.

The Referee: All right. As far as Counsel on both sides are concerned, is Mr. Del Tredici excused? You are excused, Mr. Del Tredici, unless you desire—you are welcome to stay, but I mean there is no obligation.

The Witness: I appreciate that. Thank you very much.

Mr. Fisk: We don't waive the right to recall him as our witness, if we see fit.

The Referee: No. That's correct.—Off the record.

(Discussion off the record.) [306]

* * * * *

CHARLES W. EBNOTHER

previously sworn, was recalled to the witness stand, and testified further as follows: [394]

Redirect Examination

Mr. La Shelle: Q. Mr. Ebnoter, I have here a letter addressed to you, under date of June 27, on the letterhead of Schenley Distillers Corporation,

(Testimony of Charles W. Ebnother.)

signed by Mr. E. I. Johnson, Chief Auditor, which you have just handed me, and you received that letter sometime shortly after the date of the letter, did you not? A. Yes.

Q. And you have had it in your possession since that time? A. Yes.

Q. Now, so that the Court may follow what I am doing here, perhaps the Court should read the letter.

(The letter was handed to the Referee.)

Q. Now, with respect to this letter which we just referred to, dated June 27, and the enclosure which purports to be a summary of merchandise, inventories stored in I.R.B.W. Number 2 on the premises of Hedgeside Distillery Corporation, a bankrupt—

Mr. Fisk: Now, just a minute, I am going to interrupt; if Counsel is not going to offer this letter in Evidence, I object to his putting it in by reading the contents of it. Now, the letter itself is self-serving. It's hearsay as to the Bank. I'll object to its introduction on those grounds, and I will object to him reading it into the record on the same grounds.

Mr. La Shelle: I haven't even finished the question, your Honor. [395]

The Referee: You may proceed.

Mr. La Shelle: How far did we get?

(The last question was read by the reporter.)

Mr. La Shelle: Q. To finish the question, at Napa, California, as of June 15, 1949, you will note on the two pages here two columns, one called "Type of Merchandise", another one called "The Serial

(Testimony of Charles W. Ebnother.)

Numbers of Packages”, and then another column with the headed note “Quantity of Packages”. To your knowledge as Trustee in this case, are the goods as described on this sheet, consisting of two pages, located at the I.R.B.W. Number 2 of the Hedgeside Company at Napa, California?

Mr. Fisk: I renew my objection.

The Referee: Mr. Walsh?

Mr. Walsh: Now, I object to that question, if your Honor please, on the ground it is incompetent, irrelevant and immaterial, and not the proper foundation laid. There is no showing that Mr. Ebnother ever took an inventory of the property or of the distilled spirits in the bonded warehouse, and furthermore, Mr. La Shelle is trying to prove indirectly the contents of the warehouse by Mr. Ebnother, when Mr. Ebnother—it is shown by that document that Mr. Ebnother didn’t take any inventory of the property up there.

The Referee: Mr. La Shelle did not ask him if he took an inventory. He asked him whether or not those goods were located at the distillery. [396]

Mr. Walsh: Then, I’ll make this objection: that is not the best evidence.

The Referee: Objections overruled.

Mr. Fisk: Objected to as calling for the conclusion of the witness.

The Referee: Overruled.

Mr. Walsh: May I ask a question on Voir Dire?

The Referee: Surely.

Mr. Walsh: Q. Mr. Ebnother, how did you hap-

(Testimony of Charles W. Ebnother.)

pen to know the contents of the bonded warehouse up there?

Mr. La Shelle: Well, I'll object to a Voir Dire examination at this time your Honor. This witness is the Trustee. It's his duty to know what is in his possession as Trustee.

Mr. Walsh: Your Honor please, I propose to show in my cross examination that this inventory of distilled spirits and liquor was taken by Mr. Johnson and a team from Schenley's, upon order from Court: Mr. Ebnother does not know, himself, the contents of the warehouse. It is only by virtue of that inventory that was taken.

The Referee: Mr. Walsh, Mr. La Shelle has not stated who took the inventory. His question was whether or not the goods on those two attached sheets to the letter were in warehouse number 2 at Napa at the Hedgeside Distillery; is that correct?

Mr. La Shelle: That is substantially my question. [397]

Mr. Walsh: My objection is that that is not the best evidence.

The Referee: Objection overruled. Will you read Mr. La Shelle's question?

(The last question of Mr. La Shelle was read by the reporter.)

A. I checked this record against the Hedgeside records by numbers of the serial—by the serial numbers on the packages, and this list agreed with the Hedgeside record of serial numbers.

(Testimony of Charles W. Ebnother.)

Mr. Fisk: I ask that the question go out as not responsive to the question.

The Referee: So ordered. Regardless of the records, tell us about the merchandise.

A. I can't tell you about the merchandise.

Mr. La Shelle: Q. Would you say, Mr. Ebnother, that that merchandise is not located at I.R.B.W. Number 2 at Napa, California?

Mr. Walsh: Now, just a minute, if your Honor please, I am going to object to that question—

Mr. Fisk: Objected to as irrelevant, incompetent, and immaterial.

The Referee: Wait a minute, gentlemen, one at a time. Mr. Walsh.

Mr. Walsh: My objection is it is incompetent, irrelevant, and immaterial, and the witness has already answered, [398] he just could not tell you.

The Referee: Mr. Fisk?

Mr. Fisk: Same objection—irrelevant, incompetent, and immaterial.

Mr. La Shelle: This is cross examination, your Honor, and under oath this witness has made two inconsistent statements in his answer, and I intend to cross examine him on it.

Mr. Walsh: Your Honor, please, that is not a fact that he has made two inconsistent statements under oath, and I'll challenge Counsel where he has made two inconsistent statements under oath.

Mr. La Shelle: I might state, your Honor, that proof is all right, but we are approaching an absurdity. There is not a man in this room that does not know that merchandise is up there.

(Testimony of Charles W. Ebnother.)

Mr. Walsh: Your Honor, please, I ask that that statement go out, because we are trying a lawsuit here. We are not depending on Mr. La Shelle's statements.

The Referee: The objections to the last question of Mr. La Shelle are overruled.

(The last question was read by the reporter.)

Mr. Fisk: At the present time, or on that date?

Mr. La Shelle: At any time since June 15.

The Referee: 1949?

Mr. La Shelle: 1949.

The Witness: Well, your Honor, technically I don't [399] see how I can answer that, because I never have been in that warehouse to check the serial numbers on the drums or the barrels, myself, so I don't know, when you get down to that fine a point.

The Referee: All you are expected to do, Mr. Ebnother, is to answer the questions according to your knowledge. If you don't know, we expect you to say you don't know.

The Witness: I don't know.

Mr. La Shelle: Q. Mr. Ebnother, I'll show your signature here to your Answer to the Petition here; that's your signature, is it not? A. It is.

Q. And your signature was verified before a Notary Public, a Mr. Ernest O. Meyer, and the verification is shown and that's correct, is it not?

A. That is.

Q. Now, I'll direct your attention to paragraph 4 of the Petition in Reclamation, filed by Schenley. Would you just read paragraph 4 to yourself, please.

(Testimony of Charles W. Ebnother.)

Paragraph 4, your Honor, is that part of the Petition where "it is alleged by the petitioner that at the time of the filing of said Petition in Bankruptcy herein, said bankrupt had in his possession, or said Trustee now has in his possession, the following property belonging to petitioner, to-wit," which is described.

I now direct your attention to paragraph 3 of your Answer, which reads as follows: "Denies generally and specifically, each and every, all and singular, the allegations [400] contained in paragraph 4 of said Reclamation Petition".

Upon what basis did you deny, under oath, that this merchandise which I refer to in that letter by columns in two sheets were not in your possession as Trustee?

Mr. Fisk: In the first place, may I get straightened out; the last statement of Counsel says, "Look at paragraph 3 of your Answer". As I read paragraph 3, that isn't what you read. Am I right, Mr. La Shelle?

Mr. La Shelle: That's what it says here—paragraph 3, beginning on line 2, page 2.

Mr. Walsh: Of Mr. Ebnother's Answer? You better read it again.

Mr. Fisk: You didn't give me the right copy, then.

Mr. La Shelle: All I know is that it says, "Answer of Charles W. Ebnother". It may be some other one, I don't know.

The Referee: Is that the Answer to Schenley's or the Answer to Silverado?

Mr. Walsh: That's the Answer to Silverado.

(Testimony of Charles W. Ebnother.)

Mr. La Shelle: Yes, that's Silverado. I'll withdraw the question. These things are not in order.

Mr. Walsh: Well, I'll give you my copy, if you want to read something.

The Referee: Mr. La Shelle, I think it's in the other direction.

Mr. La Shelle: Oh, I think this is the right one.

Q. That's your signature and the verification to this Answer, [401] is it not? A. It is.

Q. And referring you to page 1 of your Answer to the Schenley Petition, which, strangely enough, is paragraph 3 and reads exactly the same——

Mr. Walsh: Strangely enough, it doesn't read the same, Mr. La Shelle.

Mr. La Shelle: (Reading): "Denies generally and specifically, each and every, all and singular, the allegations contained in paragraph 4 of said Reclamation Petition."

Mr. Fisk: That's paragraph 2, though, not 3.

Mr. La Shelle: Q. Now, on what basis did you deny in that paragraph 2 of your Answer that this merchandise in question, which we have been discussing, is not in your possession as Trustee?

Mr. Walsh: Just a minute, if your Honor please. I'll object to that question on the ground it is incompetent, irrelevant, and immaterial, not proper cross examination—on what basis did he make that denial? Now, if your Honor please, examine the pleadings. This is a matter of pleading. It goes to the question of law. It is highly illegal and doesn't come within the issues of this case. He is trying to

(Testimony of Charles W. Ebnother.)

impeach the witness on an allegation in a pleading. His question directed to Mr. Ebnother was, if he knew of his own knowledge were all of these particular barrels of distilled spirits and whisky contained in that warehouse. Now, obviously, Mr. Ebnother can obtain that knowledge from records contained in the Hedgeside Distillery, or he can obtain it from other sources. That's the reason why I wanted to cross examine this witness on Voir Dire, to show that the information upon which he based his denials was received from other sources. He asked if he had direct knowledge of that.

Mr. La Shelle: May it please the Court, this denial is not on lack of information and belief. It is a flat, outright denial that this property is not in his possession as a Trustee in Bankruptcy. May I point out to your Honor this: Paragraph 2 of the Answer denies the allegation of paragraph 4 of the Reclamation Petition, which reads as follows: "At the time of the filing of said Petition in Bankruptcy herein, said bankrupt had in its possession and said Trustee now has in his possession the following property belonging to Petitioner." Now, we deny that.

The Referee: Well, supposing we eliminated the clause, "the following property belonging to the Petitioner"?

Mr. Walsh: That has nothing to do with this, your Honor; that's an answer to an allegation contained in the Petition, and when they make an allegation it belongs to Schenley's, the respondent is

(Testimony of Charles W. Ebnother.)

entitled to make a direct denial of that, and he denies that this particular whisky and grain spirits belongs to Schenley.

The Referee: Objection sustained.

Mr. La Shelle: Well, may I present my thought there, your Honor? If that's the thought, then this Answer should [403] have said, "We admit that we have this in our possession as Trustee, but we deny that it is your property, or that you're entitled to it." He is denying every single word, each and every, all and singular, the allegations of our Complaint, and then, he now comes in and says, "Oh, now, I didn't mean that". What does he mean? I am entitled to know.

Mr. Walsh: Your Honor, please, that is a matter which should be taken up before the issues were tried. If there was any objection to the pleading, it should have been made prior to the time this trial commenced.

The Referee: Well, the only thing the Court is concerned about is the question that was asked of Mr. Ebnother, and he could deny in paragraph 2 that the following property belonging to the petitioner, consisting of 8,933 barrels, is now in warehouse number 2. Maybe they belong to the Trustee, maybe they belong to someone else. If the question is whether or not the 8,933 barrels were or are now under Mr. Ebnother's possession or control, he can answer that.

The objection is sustained to the other question.

Mr. Fisk: Your Honor, may I make an objec-

(Testimony of Charles W. Ebnother.)

tion? I object to the question on the further ground that Counsel in his statement—I refer to Mr. La Shelle now—as a matter of fact, that a denial by the Trustee of paragraph 4 admits that there are 8,933 barrels of spirits in his possession. It does not. It denies that there are that many barrels belonging to the [404] petitioner stored in bond at that warehouse. That is not an answer that there are such barrels there. It's silent on that subject.

The Referee: Well, that question is not before the Court at the moment. The only question before the Court is with reference to paragraph 2 of the Trustee's Answer, answering paragraph 4 of the Petition in Reclamation, and the Court has ruled.

Mr. La Shelle: Q. I'll ask you, Mr. Ebnother, beginning at line 20, page 2, of your Answer, will you read that just to yourself, from line 20 to line 32? Have you read that, Mr. Ebnother? A. Yes.

Q. Beginning on line 20, page 2, of your Answer, appears the following: (Reading):

“Wherefore, your Petitioner as such Trustee of Hedgeside Distillery Corporation, a corporation, the above-named bankrupt, prays that the Reclamation Petition of Schenley Industries, Inc., be denied, and that the legal title to the 8,933 barrels of whisky and grain spirits described in said Reclamation Petition in Exhibit A, attached thereto, in possession of the above-named bankrupt at the time of the filing of the Involuntary Petition in Bankruptcy, and now in the possession and under the control of said

(Testimony of Charles W. Ebnother.)

respondent as Trustee in Bankruptcy of the above-named bankrupt, [405] be adjudicated and your respondent as such Trustee free and clear of any and all liens and claims of every nature and description whatsoever by Schenley Industries, Inc., and the said Anglo California National Bank of San Francisco.”

Upon what basis did you state, in that part of your Answer which I just read to you, that the 8,933 barrels set forth in Exhibit A to our Petition, was in your possession as Trustee in this case?

Mr. Walsh: Now, just a minute, if your Honor please. I am going to object to that question as incompetent, irrelevant and immaterial, and not proper cross examination. Here we have a controversy between the Trustee, the Anglo Bank and Schenley Industries, Inc., as to the title and right of possession to these particular barrels of grain spirits and whisky. Now, he is trying to impeach this witness by saying that he swore to this particular Answer.

Now, we all know that an Answer is no part of a pleading—no part of a Complaint, Petition, or Answer.

The Referee: You mean, a prayer.

Mr. Walsh: The prayer is not. That's what I mean—no part of the Petition, or a Complaint, or an Answer to a Complaint, or a Petition.

Mr. Fisk: I'll make the same objection—that it is not impeaching the witness. [406]

The Referee: Overruled. What was the basis of

(Testimony of Charles W. Ebnother.)

your statement in the prayer of your Petition, Mr. Ebnother?

A. The records which I mentioned before.

Mr. La Shelle: Q. Now, Mr. Ebnother, isn't it a fact that on or about June 15th—I may not have the exact date, but on or about June 15th, that you went to the Hedgeside plant at Napa, in company with Mr. Johnson and some other men from the Schenley organization with respect to taking a physical inventory of the goods there? A. It is.

Q. And how long were you up there?

A. How long?

Q. Yes; more than one day, weren't you?

A. Well, we came back——

Q. Well, I mean back and forth. You commuted, so to speak?

A. I think I stayed over night at Napa.

Q. But how many days were you up there on that particular thing?

A. They were there approximately three days.

Q. And how long were you there?

A. A little over two, but I was not engaged in the actual taking of the inventory.

Q. You were there with Mr. Johnson, were you not? A. That's right.

Q. Were you there with him when he checked the serial numbers against the Government records?

A. No.

Q. You didn't do that. And isn't it a fact, Mr. Ebnother, [407] that that physical inventory was taken with your cooperation? A. Yes.

(Testimony of Charles W. Ebnother.)

Q. And isn't it a fact that the Schenley Company paid all your expenses in connection with that work they did up there on the physical inventory?

A. They did.

Mr. Fisk: Your Honor, I object to that as not binding on the Bank, irrelevant, incompetent, and immaterial.

The Referee: I don't see the materiality of that last question as to who paid Mr. Ebnother.

Mr. La Shelle: Perhaps not, but I am laying a foundation for that, your Honor.

Mr. Walsh: Just an insinuation, your Honor, please.

Mr. La Shelle: This is not evidence, but with the cooperation of the Trustee, we sent Mr. Johnson up there to make this inventory, and we had a two-man team to make it, and it was made and it was checked, one of them and another, with Mr. Ebnother.

Mr. Walsh: Are you testifying, Mr. La Shelle?

Mr. La Shelle: I am not testifying. I am just stating what I had in mind to the Court. Those men are not all available to Schenley, because they are no longer employed. Therefore, we are not in a position to prove that, in the face of all these technical objections, without going up and taking another physical inventory. And I am going to ask this Court at the proper time to instruct the Trustee to take physical inventory of that warehouse, as it is part of his duty, under [408] the law, to know as a

(Testimony of Charles W. Ebnother.)

Trustee what he has received and what he is in possession of, and he is required to know it.

And I don't propose, under the circumstances existing in this case, that Schenley is going to be put to the additional expense of making that physical inventory twice, simply because it is put to its proof on this matter.

Mr. Walsh: Are you all through, now, Mr. La Shelle? I'll have a word to say on that, so the Court will know the correct facts. If Mr. La Shelle will proceed according to the Rules of Evidence, he will not have any trouble putting in this particular line of proof that he wants to get into the record. If Mr. La Shelle will put Mr. Johnson on the stand, and who handled this entire inventory which was taken after the Court granted permission to Schenley to take this inventory, he will get his proof. But he wants Mr. Ebnother to testify to certain facts that Mr. Ebnother doesn't know anything about. Mr. Johnson and the team from Schenley's as Mr. La Shelle has already told you, went up and took the inventory. The inventory was taken under the supervision of Mr. Johnson, and Mr. Johnson is the proper witness to testify as to what took place up there, and what they found in the I.R.B.W. warehouse.

Your Honor well knows that this is a bonded warehouse under the jurisdiction of the United States Government, Bureau of Internal Revenue. And Mr. Johnson and his team went in, and after

(Testimony of Charles W. Ebnother.)

permission was secured from the Government to go [409] in there and take the inventory. And I submit he is the proper witness to testify as to what took place, and what the inventory correctly states.

The Referee: Then, let the record show further that a Petition was filed in this Court for an Order to Show Cause to permit Schenley to take an inventory, and the Trustee resisted the Petition, and it was over the Trustee's objection that the Court granted Schenley permission to go up there and take the inventory.

Now, Mr. La Shelle, I think the thing for all of us to do here is to try to get the facts and the evidence before the Court. It's true that Mr. Ebnother can testify better probably than anyone else with reference to the records of Hedgeside, and with reference to the records of the Trustee; but as far as the actual, physical inventory that was taken at Hedgeside, I think that there is a man in the courtroom and probably other people that know more about the actual——

Mr. La Shelle: Well, I certainly hope so, your Honor, and with the Court's permission I'll be glad to withdraw this witness and see if we can prove it by Mr. Johnson. I anticipate objections to his testimony, which will probably be sustained.

EARL I. JOHNSON

previously sworn, resumed the witness stand and testified as follows:

Redirect Examination

Mr. La Shelle: Q. Mr. Johnson, I think you have been previously qualified as an accountant by profession, and chief auditor for Schenley, and as a public accountant. Now, on or about June 15—I ask that this be marked for Identification, Your Honor.

The Referee: Petitioner's Number 40 in Identification is a letter addressed to Charles Ebnother by E. I. Johnson, dated June 27, 1949, and it has attached to it Exhibit A, consisting of two pages, with the title "Summary of Merchandise Inventory Stored at I.R.B.W. No. 2 in the premises of Hedge-side Distillery Corporation at Napa, California, as of June 5, 1949," Number 40 for Identification.

Mr. La Shelle: Do you want to go straight through, or do you want to give the young lady a little rest?

The Referee: We'll take a little rest. It's five after three.

(A brief recess was taken.) [411]

After Recess

Mr. La Shelle: Q. Mr. Johnson, you went to Napa on or about June 15, for the purpose of making a physical inventory of the goods at I.R.B.W. Number 2 in Napa? A. That's right.

Q. And I show you Petitioner's Exhibit Num-

(Testimony of Earl I. Johnson.)

ber 40 for Identification. Is that the letter you wrote Mr. Ebnother and the enclosure mentioned?

A. Yes, it is.

Q. And how long were you there on that job?

A. Four days.

Q. And what assistance, if any, did you have in making the physical inventory?

A. I had four men working under by direct supervision, that were teamed up, two men each to a team, one man calling the serial numbers on each container up there, and the other man checking and listing the serial numbers.

Q. And by two-men teams, I take it that you worked independently of each other?

A. The two teams worked independently, yes.

Q. And were they up there for approximately four days with you?

A. They were up there for three full days, taking the inventory.

Q. And the enclosure to this letter, which is referred to in your letter as Exhibit A, is part of Petitioner's Exhibit Number 40 for Identification; did you make that up from the inventory data that these two-men teams gave you? [412]

A. I did.

Q. And with reference to the serial numbers and the number of packages and the description of the spirits, did you check that against any records there—either Government or the warehouse record, itself?

A. I checked all serial numbers and quantities

(Testimony of Earl I. Johnson.)

and types of merchandise, which are shown in the first column of the Exhibit, to the Government records maintained in the A.T.U. offices on the premises of I.R.B.W. Number 2.

Q. And with reference to the barrels, did you personally check each one of those barrels, or take the data from the two-men teams?

A. I take the data principally from the two-men teams. However, occasionally, during my stay up there, I went out and saw that the men were following my instructions, and did check some of the barrels, myself. I saw that the barrels were there and certain serials.

Mr. La Shelle: I think that's all on this particular subject for which I have called this witness at this time.

Mr. Ward: May I ask him a question, Your Honor?

The Referee: Yes.

Direct Examination

Mr. Ward: Q. Mr. Johnson, when you checked the serial numbers of the barrels and the quantities in the barrels listed in Petitioner's Number 40 against the Government records of the A.T.U. at I.R.B.W. Number 2, did your figures [413] correspond with the Government records? A. Yes.

Mr. La Shelle: Well, I think that the Exhibit here purports to state in the end a total inventory, and it alleges 8,885 packages.

A. That's right.

(Testimony of Earl I. Johnson.)

Q. And does that include the total inventory of the warehouse of some barrels in addition to the 8,933?

A. That's right. The inventory was taken without reference to any—any reference as to ownership or otherwise at the time.

The Referee: Well, then, let me understand your answer, Mr. Johnson; does that include all of the packages and all of the goods in warehouse Number 2?

A. That's right.

The Referee: When I say, does that, that means Exhibit Number 40 for Identification.

A. Right. There's 8,885 packages, which covers every package of merchandise under the control of the Government gaugers in I.R.B.W. Number 2 at Napa.

The Referee: Mr. Fisk?

Cross Examination

Mr. Fisk: Q. Do you recall the exact date when you first went up there, Mr. Johnson?

A. I can tell by reference to—in fact, we went up there twice. We originally intended to take inventory on or about [414] May 31, and after they got up there we found out that the permission, in addition to having obtained permission from the A.T.U., we had to get permission from the representatives of Hedgeside, and that was not forthcoming at the time; so I returned, and finally it was two weeks later, and we got permission to go up and

(Testimony of Earl I. Johnson.)

take the final inventory on—starting on June 13; so we were up there June 13, 14, 15, and 16.

Q. And two weeks prior to that?

A. Two weeks prior to that, we went up but did not get entrance into the premises.

Q. That is, Internal Revenue Bonded Warehouse Number 2. A. That's right.

Q. But you did go on Hedgeside premises?

A. That's right.

Q. Did you make any check—

A. There was no check made at that time.

Q. —of the books or records of the corporation? A. No, not at the first visit.

Q. You didn't do anything at the time of the first visit?

A. No, all I did at that time, I found out I did not have access to the records. I held the men in abeyance, in the possibility that we might get access during the day, and had to go into town to make a telephone call into our San Francisco office, to advise the production representative that we were not able to take the inventories or do any work up there at Napa. [415]

Q. Was there a Government gauger there, present at the time of your first visit? A. Yes.

Q. Do you remember his name?

A. No, I don't.

Q. And was there a Government gauger at the time of your second visit?

A. Yes, there were several Government men.

Q. And I believe you testified that you had two

(Testimony of Earl I. Johnson.)

teams of two men each, working under your supervision? A. That's right.

Q. And that you spot checked their work?

A. That's right.

Q. In other words, you actually went into Internal Revenue Bonded Warehouse personally?

A. That's right, I did.

Q. Well, will you tell us something generally about how these packages were stored in the warehouse?

A. The packages are stored—there's a cellar and an upper floor consisting — there's two buildings, both classified as I.R.B.W. Number 2. The upper floor, I believe, are tiered six high and they're in tiers, and they vary as to depth. There may be ten to twelve barrels deep on each tier, and in the cellar I believe it's four high, with the same number of barrels or drums in depth.

Q. Some of these packages were, of course, barrels, and some of them were metal drums, is that right? A. Yes.

Q. All of the 9,000— A. 885. [416]

Q. 883 or 5? A. 5.

Q. Packages—were drums or barrels?

A. That's right.

Q. Now, let us take the oak barrels; what description was on the oak barrels, other than the barrel numbers?

A. Well, that varies to some extent. Generally, it stated the type of contents. In some instances they were potato, in some cases grain spirits, and some

(Testimony of Earl I. Johnson.)

few cases some alcohol, and in certain instances, I believe, whisky.

Q. You are talking, now, about oak barrels?

A. On the oak barrels, no; let's see. I want to recap this. The alcohol would be stored in steel containers. The oak barrels would contain either spirits, whisky, and by spirits in certain instances there were grain spirits, and in certain instances there were some fruit spirits up there, I believe. I don't recall specifically.

Q. Well, now, there was a serial number on each oak barrel, and you say an indication of the gallonage in the barrel?

A. The gallonage in the barrel, no. Generally, the barrels carry, I believe, 50 gallons, but we were not taking that. We were not interested in the liquid content of the barrels.

Q. And your inventory, then, didn't in any sense consist of an inventory of the gallonage in there?

A. No.

Q. It was simply an inventory of packages?

A. That's right.

Q. Which were either oak barrels or metal drums, and the only [417] identification you took with respect to those packages were the numbers, that is, the quantity of them, and the serial numbers appearing on them? A. That's right.

Q. Is that right?

A. That's right. However, I might add there, Mr. Fisk that those serial numbers and quantities were tied into the Government records, which specifically

(Testimony of Earl I. Johnson.)

state the classification of merchandise presumably contained in the barrels or containers.

Q. Take one of these teams of two men, how did they operate?

A. Well, that's a matter of operating procedure from an accountant's standpoint. When we make an audit in any case, if we have a two-man team working, one man actually inspects the barrels; that means in the case of I.R.B.W. Number 2, it meant climbing up on the rack, inspecting with a flash light in many instances, to ascertain what the actual serial numbers show or imprint on that barrel or container was, calling them out, the other man repeating the number so that he was sure that he got the proper serial number designated on the container, and listed that on a sheet of paper, which we had pretty well set up; we knew approximately what the ranges would be.

Q. Now, that sheet of paper would consist of your work sheets supporting this inventory; is that right?

A. That's right.

Q. And I take it, you still have those in your possession? [418]

A. I have them in my possession here in court.

Q. There are two sheets of work sheets, I take it, one for each team?

A. That's right.

Q. You didn't make any third set up—

A. No.

Q. —when you made your spot check?

A. No.

Q. Did the oak barrels have anything on them,

(Testimony of Earl I. Johnson.)

indicating whose barrels they were? A. No.

Q. And the same thing, I take it, was true on the metal drums? A. That's right.

Q. So far as this inspection is concerned, or inventory taken of your spot check, you did not note down anything else with respect to the barrels themselves, except their physical presence and the serial number on them?

A. That's all.

Q. Is there any notation about where the containers were produced on the barrels?

A. I believe there was, but we made no designation on our inventory sheets.

Q. You paid no attention. Is there any indication as to the date as to which the barrel was filled?

A. I believe that's designated on the barrel or on the container, but we did not make any note of that on our inventories.

Q. And according to your experience, is it ever the practice [419] in a case of that kind, after a barrel is once filled and placed in an Internal Bonded Warehouse, to withdraw a portion of the contents?

A. It has not been my experience. I believe it's not allowed by law, except by the Government gaugers, to take a sample. I'm not sure of that.

Q. Well, is it the practice, and is it permitted by the A.T.U., to go in and buy one-half of the contents of a barrel and withdraw it and tax pay it?

A. I don't know.

Mr. La Shelle: Just a moment, Your Honor, I'll

(Testimony of Earl I. Johnson.)

object to that as a matter of law, and not a matter of evidence by this witness.

The Referee: Sustained.

Mr. Walsh: I didn't hear, Your Honor.

The Referee: Sustained.

Mr. Fisk: Q. You heard Mr. Woolsey testify this morning? A. Yes.

Q. Schenley has in its possession warehouses or storage houses with spirits stored in bulk; did you ever withdraw—did Schenley ever withdraw a portion of the containers, of one barrel?

A. To the best of my knowledge, no.

Q. Now, after each of these two teams complete their work sheets, they then took them out and checked them against the Government records, you say? A. I did that personally. [420]

Q. You did that personally? A. Yes sir.

Q. You checked those work sheets against all Government records?

A. I would have—I believe it's form 1520, designated as for 1520 on the Government premises up there. I'm not sure as to the form number. It's the record which the Government keeps, showing what is on hand under their control at I.R.B.W. at any given time.

Q. Well, I ask that the portion of the answer go out—"under their control at any given time"—as the conclusion of the witness. I ask it, because of Mr. La Shelle's insistence that this witness knows nothing about what is under the control of the A.T.U. or what its requirements and duties are.

(Testimony of Earl I. Johnson.)

The Referee: That portion may go out.

Mr. Fisk: Q. Where was the Government record kept that you checked?

A. It's in the A.T.U. offices connected with the I.R.B.W. Number 2, in Napa.

Q. Physically connected with it? A. Yes.

Q. In the same building?

A. There are two buildings; the offices themselves are segregated from the building by partitions. You can't go into the I.R.B.W. through the office. The office is separate from it. But it may be—I have forgotten now exactly whether it's part of the same building, or whether there is a partition to the building. [421]

Q. As a matter of fact, there's no connection between the two buildings at all, is there?

A. No, that's right.

Well, when I say "two buildings", there are two buildings making up I.R.B.W. Number 2; and the Government office is directly adjoining one of the two buildings, but you cannot enter either of the buildings where spirits are stored, through the offices of the Government gaugers.

Q. Was a Government gauger present?

A. Yes sir.

Q. At the time you checked his records?

A. Yes sir.

Q. And you obtained his records from him?

A. That's right.

Q. It wasn't available to you, without his being present?

(Testimony of Earl I. Johnson.)

A. That's right. They will not release those records to any outsider. They have to be in presence at all times.

Q. Now, you think it's form 1520. Have you any notation here that you can refresh your recollection on?

A. I could, yes. I've got some notes.

Q. Will you do that?

A. Yes, it is Government form 1520, Mr. Fisk.

Q. From your notation can you state what the date of the form was—1520?

A. These forms are prepared at the time—now, I don't know whether to make this on the record. Can I just qualify this [422] a minute, Your Honor?

The Referee: You can answer Mr. Fisk's question and then explain it.

The Witness: All right. As I understand it—I will put it that way, Government forms 1520 are prepared at the time of entry of spirits or whisky, or whatever the product might be, into an I.R.B.W. Number Two, into any I.R.B.W., rather; and it's my understanding that if the spirits or whisky or other merchandise in question is removed, entries to that effect are shown on the form 1520.

Again, it's my understanding that at any given time or after a given date, the forms 1520 are presumed to show a record of what is supposed to be physically in the inventory on the premises.

Mr. Fisk: Q. Are you more or less familiar with the Government form 1520?

A. I believe so, yes.

(Testimony of Earl I. Johnson.)

Q. Well, it's quite a long form, and it's got a great deal of information on it, hasn't it?

A. That's right.

Q. And the form is made out monthly or daily?

A. No, it's made out at the time of entry.

Q. In other words, when the distillery is producing, the Government gauger makes it out yearly, is that right, as goods enter the warehouse?

A. As goods enter the warehouse, that's my understanding, [423] because they show on the Government form 1520, they show the serial numbers, when it was produced, when it was shipped to the I.R.B.W., and when it was received into the I.R.B.W.

Q. Well, now, you state that the only purpose of this inventory was to make a physical check of what was present in the warehouse?

A. That's right.

Q. Why did you check it against the Government form?

A. From an accounting and auditing standpoint, we always try to tie down every possible proof of an inventory. It's one of the most important jobs that we have.

Q. Well, even if you found a barrel of spirits on the Government form, if you didn't find it physically in the warehouse, that wouldn't add to your inventory taken, would it?

A. Yes, but it would prove the other way, that if we did find it both on the inventory and on the Government form, that it gave us that much ad-

(Testimony of Earl I. Johnson.)

ditional assurance that the inventory was actually in existence, as stated.

Q. And what were your findings in this case, in that regard?

A. In all instances, our physical inventory or summary of physical inventory tied in with the Government record forms.

Q. Now, do you have any records in your notes as to the date of the Government forms that you checked against the particular barrel that you found on the premises?

A. I knew that on the Government form we showed—I took off a summary of the date as to when the merchandise which [423-429] was in the inventory was placed into the I.R.B.W. The Government forms which I examined, the information which I took off from the—I know the information is on the Government form 1520 showed the barrel serial numbers, the date of production, when it was shipped to I.R.B.W. Number 2, if it was from an outside source, and the date on which it was received into I.R.B.W. Number 2.

Q. Regardless of what source it was from?

A. That's right.

Q. That's all the Government form had on it, is that right?

A. That's all of the information that I felt was pertinent to my purposes.

Q. And did the Government form have anything on it as to whom the packages belonged to?

(Testimony of Earl I. Johnson.)

A. Yes. Not whom it belonged to; it shows who the producer was.

Q. In this case whether Hedgeside had produced it, or Mountain View had produced it?

A. That's right.

Q. But you didn't check that against the barrels or the drums? A. No.

Q. Now, if the Government form 1520 was made out at the time of entry, some of the spirits had been there for a good number of years?

A. That's right.

Q. And there is an entry made upon withdrawal; is that second entry made on the original form 1520, as originally made out, or is there a subsequent form 1520 in which you could tie the [430] two facts together?

A. That is something I don't recall—was there—Mr. Fisk. I know that we had received the form 1520's, pertaining to what was on hand in the I.R.B.W. Number 2, from the Government men and received all their current copies of form 1520, to which I checked the inventories taken.

Q. But you don't recall whether you had to go back and look at May 1, 1945, and then check it against everything subsequent to that time, to see if it had been withdrawn or not?

A. No, if I recall properly on this—and this is six months ago—if I recall properly, these serial numbers and the entries followed the production date, and the serial numbers followed production date, and I had already prepared my summary of

(Testimony of Earl I. Johnson.)

inventories on the basis of serial numbers, so it was a relatively easy matter to follow the serial numbers from my summary to the Government records.

Q. Did you make any check as to whether or not a copy of that form 1520 is furnished Hedgeside's offices and filed with them?

A. No, sir.

Q. Do you know that of your own knowledge?

A. No, I don't know.

Q. You didn't make any effort to find that out?

A. No, I felt satisfied that the Government records were sufficient for my purposes.

Q. Now, besides these facts that you have just testified to, what other records did you check? [431]

A. You mean while I was up on the premises?

Q. Yes.

A. I made a complete review of the records which had been previously put into Evidence, and which had been previously put in Evidence—what's the additional term—Evidence and——

Mr. La Shelle: Identification.

The Witness: ——Identification, that had been presented here. The Hedgeside negotiable and non-negotiable receipt book, I made a complete review of those and took the items for which the original copy had not been cancelled and listed by serial number, the contents supposed to be covered by the Hedgeside receipts, the quantities; where Schenley's name appeared on the receipt, I took a record of that off; then I took a complete record of those

(Testimony of Earl I. Johnson.)

where the original warehouse receipts had not been turned in for cancellation.

Mr. La Shelle: If it please the Court, I put Mr. Johnson on here, just for the limited purpose of proving physical inventory. This is now—I didn't realize it—going into other phases of the case. I don't think at the present time it is proper examination.

Mr. Fisk: Your Honor, I am asking him what records he checked in connection with the taking of inventory, and I submit I am not limited to what Mr. La Shelle wants me to examine him on. I am entitled to test what he did.

Mr. La Shelle: I am going into all that on direct examination, later, Your Honor. [432]

The Referee: With the same witness?

Mr. La Shelle: Oh, yes. I mean, I put him on now, and I want to put Mr. Ebnother back on for a few minutes. I think I just asked the Court to exercise discretion at this time as to procedure to limit cross examination to the physical inventory up there, without regard to ownership.

Mr. Fisk: Well, Your Honor, he has testified he went up and took a physical inventory, and he checked it against Government records. I am entitled to ask him if he checked it against other records, and if he did what they were.

The Referee: I am going to permit you to go on, Mr. Fisk, but I was just wondering whether or not it would change your opinion with reference to your examination at this time, had you known that

(Testimony of Earl I. Johnson.)

Mr. La Shelle was going to call him back for this and other purposes?

Mr. Fisk: Oh, yes.

The Referee: There would be no prejudice, as far as Mr. Fisk is concerned on cross examination.

Mr. La Shelle: No prejudice.

The Referee: With reference to any other records he checked, other than Government records, at the time he was there.

Mr. La Shelle: None whatsoever.

Mr. Fisk: It might to some extent, but I don't think this question would fall in that category.

The Referee: Well, I am not going to stop you.

Mr. Fisk: The witness's answer, I must say, went a little bit afield from my question. I simply asked him what other records he examined.

The Witness: All right. I can restate that. I checked and took a summary of open warehouse receipts. I also was given copies of the papers which had been prepared by a public accounting firm at a prior examination, where they had taken an inventory. The public accounting firm was Arthur Anderson and Company. They had made an examination up there of the inventory, presumably on the premises.

Mr. Fisk: Q. For whom had they made the examination, do you know? A. I don't know.

Q. Did you inquire?

A. I inquired, and was in effect told it didn't concern me.

Q. Did they turn their examination over to you?

(Testimony of Earl I. Johnson.)

A. No. No, but the papers in support of the inventory had been and were in the possession of Mr. Ebnother up there.

Mr. La Shelle: As a matter of fact, the Government was paid for that, Mr. Fisk.

Mr. Fisk: I gather it was, but I am rather interested that they turned over to Mr.—

The Witness: No, the only thing that was turned over was a record by Mr. Ebnother of the total number of barrels, which were supposed to be on the premises up there at that time. [434]

Mr. Fisk: Q. As a matter of fact, they are your regular accountants, are they not?

A. That's right.

Q. Might I see your work sheet, which you are refreshing your recollection from?

A. Yes. Let's see, I referred to where I had taken the summary of Government records. I trust this is all right with you, Kirk. Your Honor—

The Referee: You are well represented by Counsel, Mr. Johnson. They will protect you when you get in the clinches.

The Witness: I have a lot of papers in here, some pertaining to—I forgot to go back here. Usually I have these scheduled up, so that I can refer right to them, but I have them resorted by—resorted them so many times to get the schedules prepared. This is the summary I have taken off from the form 1520.

(Discussion off the record.)

Mr. Fisk: Q. Are the three work sheets that

(Testimony of Earl I. Johnson.)

you have there the only sheets that were made in connection with that inventory—the only records anywhere?

A. Oh, no, this is the record back here of the inventory records which were prepared as we took the inventory.

Q. Well, what was the one you just showed me?

A. That was from the Government 1520 records, which I took off myself. This was the record which was prepared at the time when the inventories were taken at I.R.B.W. Number 2, [435] showing the serial numbers.

Q. These four men—Buxton, Safer, Black, and Canale—made up the two teams?

A. That is right.

Q. Well, now the printed form that you have shown me, with 1, 2, 3, 4, 5, 6 columns that represents the recording that these men who physically made the inventory set up—is that correct?

A. That's right.

Q. Explain to me how that works on that column to the left. I see a figure, number 59-W-801. What does that indicate?

A. Well, the 801 is key number, that is the serial number, and the thing that we went by—I mean, 54 or 59; W was additional information which the men put down as they went along. The 801 is the beginning of the range of the serial numbers shown on this sheet, and wherever we have a check it designates that there was a barrel having that number on it, 801—I haven't referred to these in some time.

(Testimony of Earl I. Johnson.)

Well, the 801, 802, 803, and so forth, this sheet is set up for convenience purposes, so that we did not have to keep writing where there was 800 series, we would not have to keep writing the "8", so 801 there, when it goes to 810, we still eliminate the "8". It just goes right on up in serial numbers.

Q. Was this check that you made on June 13 to 15 the first inventory of that character Schenley had ever made of Internal Revenue Bonded Warehouse Number 2?

A. Of Internal Revenue Bonded Warehouse Number 2, under my [436] supervision, yes. I believe that's—

Q. Is that the first one that you know of?

A. It's the first one I know of, yes.

Q. Didn't you previously testify in this case that, as auditor or accountant in this area, that you made a check of once a month? A. No.

Q. You did not? A. No sir.

Q. And you acted as travelling auditor in this area, do you not? A. That's right.

Q. Don't you make a periodic check of the warehouses?

A. Where warehouses are owned by outsiders, outside of Schenley itself, the normal operating procedure on that, when it's an Internal Revenue Bonded Warehouse, is that we have outside auditors come in at least once a year, and sometimes more often, depending on S.E.C. requirement, and one procedure is to have a confirmation receipt of the contents of the I.R.B.W. from the custodian.

(Testimony of Earl I. Johnson.)

That acts as a certification of the inventories in that warehouse. Where it's our own warehouses and operated by Schenley and the Government man in conjunction, we do take the inventories.

Q. I have asked you this question once, but I want to be sure that I understood your answer. The only check that you made at this time, that is, June 13 to 15, was with respect to the number of barrels and drums of spirits and whisky and the serial numbers of them; is that right?

A. As far as the physical check is concerned, yes. [437]

Q. And that's all that was done at that time by you or any of the four men under you?

A. Now, I want to make sure that I understand that question.

Q. I want you to.

A. Would you read that?

(The last question and answer were read by the reporter.)

The Witness: I did certain things in addition to taking a physical inventory while I was up there in the premises. I believe I brought that out when I said I made an examination of the warehouse receipt books and the Government record, and so forth.

Q. But the check was limited, then, to the check in Internal Revenue Bonded Warehouse Number 2. You did nothing but check the physical existence of the barrels and drums and the serial numbers?

A. That's right.

(Testimony of Earl I. Johnson.)

Q. You didn't go into ownership or anything of that kind? A. No sir.

Q. Nor did any of the four men under you?

A. No.

Mr. Fisk: That's all I have at this time.

The Referee: Mr. Walsh?

Mr. Walsh: It's four o'clock, Your Honor.

Mr. La Shelle: We were a little late starting this morning. I have just a couple of things that I would like to take up, if I may go ahead.

The Referee: Same witness? [438]

Mr. La Shelle: Yes.

Mr. Fisk: Just a minute. I have no objection in this instance, but I don't think that Counsel should put a witness on the stand and have him bring out two or three facts, and then have him cross examined, and then bring him out again two or three more facts and have him cross examined, and on, and on, and on. After all, I think we are entitled to have the witness get on the stand and testify and have our cross examination, all in one scoop, and not have it pieced up, so that the witness as he goes along, he has as much benefit of, or has the full benefit of any cross examination. It will be highly ineffective, I would say.

The Referee: Well, Mr. Ebnoter was excused because of certain objections made to his knowledge with respect to the inventory at Hedgeside. Mr. Johnson was placed on the stand as being a better witness with respect to the actual inventory of the goods at Hedgeside, and that is the only reason

(Testimony of Earl I. Johnson.)

that Mr. Johnson is on the stand at the present time.

Now, Mr. La Shelle, if these few remaining questions that you mentioned pertain to the physical inventory, you may ask him. If they do not, then we will——

Mr. La Shelle: I understand that. Your Honor, at this time petitioner offers in Evidence Petitioner's Exhibit Number 40, for the express purpose of establishing in this case that the merchandise referred to in Exhibit A of [439] petitioner's Petition is located at I.R.B.W. Number 2, Napa, California.

Mr. Fisk: And I want to object to it on the ground it is irrelevant, incompetent and immaterial. It calls for hearsay in Evidence, as far as the Bank is concerned, and it is self-serving.

The Referee: Mr. Walsh?

Mr. Walsh: Well, I make the same objection, and I am going to make further objection that there has been no proof or foundation laid to show that the contents of the barrels—in other words, following Mr. La Shelle's very loud statement that he is going to require the Trustee to prepare and file an inventory of this distilled spirits and liquor,—I might state that there is no showing of what are the contents of these barrels, and is every barrel—does every barrel contain the full number of gallons?

Mr. La Shelle: If it please the Court, I would like to make this comment. It is true,—and I'll ask you if I may, before I develop this one question:

(Testimony of Earl I. Johnson.)

Q. Are the four men of the two-man teams available now?

The Witness: No.

Q. All four of them?

A. No sir, there is one not available.

Mr. La Shelle: All right, now, Your Honor. It is apparent that the Trustee, himself, has stated in his prayer, as Your Honor read the other day that this merchandise was [440] in his possession. Counsel for the Bank has stated here today that Arthur Anderson has made a physical inventory up there.

Mr. Fisk: I haven't stated any such thing. You ought to make your statements, if you are going to make them, reasonably accurate.

Mr. La Shelle: Well, I'll leave that to the Court's——

Mr. Fisk: Leave it to the record.

Mr. La Shelle: Leave it to the record as to whether that's true or not.

The Referee: Submitted?

Mr. La Shelle: I would like to add this, if I may, Your Honor. We have 9,000 barrels, approximately, of spirits, that are just floating around the country. Nobody knows where they are. We went up there in June, in cooperation with the Trustee, in the best of faith, to make a physical inventory. We paid all of the Trustee's expenses in connection therewith, according to his own admission. It is an important phase of this case for this Court to determine whether or not this merchandise in dispute is in possession of the Trustee, because if it is, the

(Testimony of Earl I. Johnson.)

Court has summary jurisdiction. If it isn't, the Court does not have summary jurisdiction.

Now, I ask, therefore, that unless the parties, the Bank and the Trustee, will here and now stipulate that the goods mentioned in Exhibit A of our petition are in the [441] possession of the Trustee, on the ground that the Trustee's duty is to know it's in his possession, I ask at this time that an order of this Court, instructing the Trustee to make a physical inventory and return it into court as competent proof, so that the Court will know whether or not it has jurisdiction of the summary proceedings, be made.

I think that Schenley has acted in the utmost good faith, and I think that the time has come for the Court to exercise its discretion to issue that order. Otherwise, we have to again make a petition to this Court for permission to go up there, because one of our four men is missing, and there is an objection made here that it is hearsay, and it is probably technically correct. I think that the time has come for the Court to exercise discretion to expedite the hearing of this case.

The Referee: Submitted?

Mr. Walsh: No, Your Honor. I make one more statement, and I hate to bore Your Honor with this statement, but in the light of Mr. La Shelle's statement, I feel I have to do it.

Now, Your Honor well knows, and Mr. La Shelle knows, something about Internal Revenue rules and regulations, and knows that the Trustee cannot take

(Testimony of Earl I. Johnson.)

a complete inventory of that liquor up there. He cannot go in and open up any of those barrels to determine whether or not each barrel contains the specified number of gallons—500, whatever [442] gallons it might be. We don't know whether those barrels contain a half a barrel, three-quarters of a barrel, or a full barrel.

Now, if it is Mr. La Shelle's contention that if the order for Reclamation is granted and the Trustee is directed to turn over to Schenley so many barrels of whisky and grain spirits, and it is found that some of those barrels only contain a half a barrel, is the Trustee liable for that? Is he required to turn over to Schenley the liquor that is missing in those barrels? These gentlemen know that some of those barrels are not completely full, and somewhere along the line there is going to be a day of reckoning as to the amount of goods that has been lost, and somebody has to pay for that. And that is the reason the Trustee or no one else can go in there and take a complete physical inventory of those barrels, to determine just how many gallons are contained in each barrel, because the Government won't let them.

Mr. La Shelle: May I explain that position? Perhaps the Court is not fully aware of original gauge; but when they're put into barrels, the Government gauger takes the original gauge, which I am not sure but I think is about 48½ gallons to a 50-gallon drum, something like that. They can't fill them right up to the top. Then they stay that way—and I am not stating this as a matter of evidence

(Testimony of Earl I. Johnson.)

but as a matter of law—under the A.T.U. regulations [443] and representing this to be the law to the Court— Then, when they're withdrawn, then the Government gauger takes his second gauge, and unless they're withdrawn, then a determination is made as to whether there is excess outage. Under the tables employed by the A.T.U. Rules and Regulations, you are allowed a certain amount of outage due to evaporation. In other words, let us say, for four years you are allowed four gallons—I forget what the amounts are. If you have five gallons, you have got an excess outage of one gallon, and even if you have lost that one gallon, the Government nevertheless takes its tax on that missing gallon. That's what happens.

Now, as this physical inventory,—if we go up there and want the Government gauger to regauge one of these barrels, I submit, Your Honor, that that is not required in this case. We will be perfectly willing to take those barrels, and we will pay whatever taxes on them when, as, and if we are entitled to them.

The Referee: Mr. La Shelle, in the event that Schenley prevails in this Petition for Reclamation, would Schenley be willing to take the barrels, and what is in them or what might not happen to be in them? In other words, meeting Mr. Walsh's contention, supposing these particular packages, which I don't think is pertinent at the moment, but they're listed as packages. It's not listed as gallons. Supposing the package which contains a half or a quar-

(Testimony of Earl I. Johnson.)

ter of a barrel, or nothing [444] at all, but the serial number was on the barrel and the number of packages were there, and it originally had, for instance, "grape lees brandy", and Schenley prevailed, would Schenley be willing to take those barrels with the serial number on it, regardless of what was in them?

Mr. Woolsey: I have no authority to give you a final answer, but I think I know exactly what it is. We would take the barrels—there are barrels—I mean, that's our claim here—if it's gone, we have lost it. We have tried to find out what happened to it. If Mr. Stone of Hedgeside, in running a warehouse, has been negligent, or something, we would come in and file a claim and become a creditor and share under that, too.

The Referee: Wait a minute, gentlemen, is this matter submitted? With reference to Petitioner's Exhibit 40, I have objection to it. Is this submitted?

Objections overruled. Petitioner's Exhibit Number 40, formerly for Identification, is now in Evidence. Same number.

Mr. La Shelle: I take it that the state of the record and the stipulation that I have requested would be refused.

Mr. Walsh: What stipulation?

Mr. La Shelle: I asked for a stipulation from the Bank and the Trustee that the goods mentioned in Exhibit A, and set forth therein in our Petition, are in the possession of the Trustee; that is, the barrels of spirits in I.R.B.W Number 2 in question. In the absence of that stipulation, [445] for the

(Testimony of Earl I. Johnson.)

reasons heretofore stated, so that there can be no question about this question as to summary jurisdiction and possession of the goods, and on the further ground that it is the duty of the Trustee if no one is in his possession, I ask the Court to instruct or order the Trustee to conduct a physical inventory within a reasonable time, and to return that inventory with competent legal proof to this Court at one of the dates already selected for this hearing in January.

The Referee: You want the Court to order the Trustee to do that, just to decide whether or not the Court has summary jurisdiction?

Mr. La Shelle: That's one of the purposes, but I state that it is the duty of the Trustee to know what he's got in his possession.

The Referee: As far as your Petition in Reclamation is concerned, Mr. La Shelle, I'll decide right now that I have summary jurisdiction.

Mr. La Shelle: Well, the Bank may well claim on review that there is an error there.

The Referee: You are asking the Court to rule, and the Bank may claim on review that there is error if I send the Trustee up to make an inventory, too.

Mr. Walsh: Your Honor, I think that is one of the silliest requests I have ever heard made. In other words, Mr. La Shelle wants the Trustee to go up and make a physical [446] inventory, to go to the expense of doing that, for his benefit, even if we don't know whom the property belongs to. If the

(Testimony of Earl I. Johnson.)

property does not belong to the Trustee, we are not required to make that inventory.

Mr. La Shelle: In other words, the Trustee is not responsible for property in trust?

The Referee: That is not the contention, gentlemen. This Number 40 indicates certain packages that are now in Evidence; the Court is not instructing the Trustee or Counsel for the Trustee, to make a physical inventory of I.R.B. Warehouse Number 2.

Mr. Fisk: And the Bank is not stipulating. If you want this witness to testify in this Court now that he knows Arthur Anderson made such an inventory, I would like to have him say so. That's your contention, Mr. La Shelle. Do you want this witness to make that statement?

Mr. La Shelle: No, I heard you make such a statement.

Mr. Fisk: You didn't hear me make such a statement.

The Referee: This is a good time to adjourn. Gentlemen, as I understand it, there will be no hearing on the 20th, and the next hearing in the Hedge-side will be on December 22nd.

Mr. Walsh: For the purpose of the record, Your Honor, there is an original record of the Trustee now in Evidence. That is the inventory, and it is Respondent's Exhibit Number 40. I would like permission to withdraw that and have photostatic [447] copies made and return that Exhibit.

Mr. La Shelle: No objection.

The Referee: Let the record show that Mr. Walsh has taken Petitioner's Exhibit Number 40.

[448]

* * * * *

EARL JOHNSON

previously sworn, resumed the witness stand, and testified further as follows:

Further Direct Examination

Mr. La Shelle: I might mention, also, Your Honor, [563] purely just for your own convenience in following this, that the warehouse receipt numbers that I just read off, this Schedule ties into that, these are the Hedgeside receipts now outstanding and those are the corresponding Mountain View receipts which were surrendered and these issued in lieu thereof, the typewritten part in there, the purpose I don't have in mind, I don't think it serves any purpose.

Q. Now, Mr. Johnson, I'll hand you the group of Exhibits under Petitioner's Exhibit Number 30 for Identification, and as I understand it, you assembled all of those documents with the exception of the letters from Hedgeside to Schenley enclosing warehouse receipts? A. I did.

Q. And the various documents that are in that group you secured from the Schenley offices?

A. That's right.

Q. They were kept there in the regular course of business? A. Yes.

Q. Now, I don't want to take the time to go over each one of these——

(Testimony of Earl Johnson.)

Mr. Fisk: Well, just let me interrupt here a minute. I object—I ask that the last part of his answer go out, as calling for a conclusion of the witness, no foundation laid for it. The portion where he said, “kept there in the regular course of business.”

Mr. La Shelle: Well, just a moment, Your Honor—— [564]

Mr. Fisk: He said he took these documents from their files. Now, he hasn't qualified this witness. These are not, excepting some of them, all of these documents are not records kept in the regular course of business of Schenley. They aren't documentary records, such as journals and ledgers, memoranda kept by Schenley. These are documents. Some of them are at least brought in from the outside. Obviously, the witness is not qualified to give that testimony.

Mr. La Shelle: May it please the Court, at this time we ask that the objection be overruled, and further make a motion to strike the objection on this ground. Pleadings in this case disclose, beyond the question of any doubt, that the Bank is disputing title with the Petitioner of all of the merchandise which we have referred to as the Heaven Hill purchase. They have pleaded duplicate warehouse receipts covering that merchandise. As to the spirits in question, they have pleaded and claimed as 574 barrels of that, which are grouped as one Exhibit for Identification Number 43. The petitioner in its Petition has listed each one of these warehouse re-

(Testimony of Earl Johnson.)

ceipts in Exhibit A to the Petition. The Bank has not pleaded in its Answer any claim of title to those goods whatsoever, but has limited their claim of title and their dispute with Schenley over title to the Heaven Hill whisky and the 574 barrels.

Now, as I understand the situation, both the Bank and the Petitioner here can properly be classified as contingent, [565] unsecured creditors, to the extent that either one may lose in whole or in part its claim to the ownership of these goods. To that extent, when, as, and if that decision becomes final, either the Bank or Schenley, or both, as the case may be, will become contingent, unsecured creditors, as to the amount of their loss there. In that respect, it is my understanding of bankruptcy procedure and the law applicable that unsecured creditors, both the Bank and Schenley, are represented by the Trustee, and by Mr. Walsh acting for the Trustee; and as to this property, of which the Bank's only interest is as a contingent, unsecured creditor, it has no standing before the Court whatsoever.

I might illustrate that what I mean by that is that the Silverado people, who made a Petition for Reclamation, if they lose, they are interested in the Trustee getting this, because there will be more in the pot to divide among the unsecured creditors; but they have no right to come in here and conduct a cross examination and take part in a proceeding, any more than Schenley's would have a right to go into theirs as a contingent, unsecured creditor.

So for that reason, insofar as this evidence is con-

(Testimony of Earl Johnson.)

cerned, Petitioner's Exhibit Number 30 and 31, it is my contention that the only parties that are properly before this Court as to this evidence is the Petitioner on the one hand, and the Trustee on the other; and Mr. Ward here has a case which I would like him to cite to Your Honor, which I [566] understand is directly in point.

Mr. Ward: The case referred to is: *In re Tapp*, 65 Federal Supplement 171. The portion which we are citing to the Court is found on page 173, and reads as follows:

“The Referee declined to consider Petitioner's objections to the claims of the Federal Housing Administration, Montgomery Ward, Bartlett Brothers, McDonald Poultry Company, and Bush Plumbing Company. His ruling is approved.

‘A general creditor of a bankrupt has no right to contest another creditor's claim or to appeal from the refusal of the Court to disallow it, unless upon application the Trustee has refused to do so and the District Court has authorized a creditor to proceed in the Trustee's name.’ ”

Citing *Fred Reuping Leather Company versus Fort Green National Bank of Brooklyn*, 102 Federal 2nd, 372, and other cases.

Your Honor, that case seems to hold exactly what we are contending for here, that the Trustee represents all the unsecured creditors until such time as the Trustee refuses to perform some function

(Testimony of Earl Johnson.)

of his office, at which time the Petitioner may petition the Court for leave to act for the Trustee. In this case, the Petitioner was objecting to the claim of another creditor.

Mr. Walsh: What kind of a claim—unsecured?

Mr. Ward: Yes, unsecured against the assets of [567] the Estate.

Mr. Walsh: An unsecured claim, adverse interests.

Mr. Ward: As I understand the situation here, the Bank or Schenley will be in the position of an unsecured creditor, if they lose their Petition for Reclamation. It is exactly the same situation. They are represented by the Trustee.

Mr. La Shelle: I might add to that, Your Honor, that as a practical matter it is obvious that if the Bank is dividing this into roughly—I forget the exact numbers, but it's about 9000 barrels here involved—and the Bank is claiming roughly three—that isn't the exact number, but we will take that—the Bank is proceeding under the theory that their prorated share, unsecured of nine, might equal or exceed possibly their full share of 3,000 barrels.

I have no quarrel with that theory. It would be to their interest. However, the interest that is being put in here is the interest of an unsecured creditor, who is a contingent unsecured creditor; it has no interest in that. It's not claiming any part of it. The Bank was joined because we alleged that they claimed title to some of this goods. They were served, they come in and file an answer, and they said,

(Testimony of Earl Johnson.)

“Yes, we claim the Heaven Hill whisky and the 574 barrels.” But they don’t claim any of this, so they are only interested in this as a contingent unsecured creditor.

Mr. Fisk: If Your Honor please, in the first place, [568] when a petition is filed—does Your Honor object to my sitting down?

The Referee: No.

Mr. Fisk: It’s no lack of respect of the Court.

The Referee: Go right ahead.

Mr. Fisk: In paragraph 7 of this Petition, it is alleged—or paragraph 8 of the Petition:

“Your Petitioner is informed and believes and therefore represents the fact to be that Anglo California National Bank of San Francisco, number 1 Sansome Street, San Francisco, California, claims an interest in said property——”

talking about all of the property——

“—adverse to Petitioner, and is therefore a proper party to this proceeding.”

We have been through all this before. In paragraph 8 of the Bank’s Answer, the Bank answering paragraph 8 of said Petition in Reclamation, says:

“That your answering defendant claims an interest in the 8,933 barrels of whisky and grain spirits as to which Schenley Industries, Inc. seeks the surrender of by the Trustee in Bankruptcy.”

Now, it has not yet been established in this proceeding what the interest of the Anglo Bank is in

(Testimony of Earl Johnson.)

this whisky and grain spirits, and Mr. La Shelle was unwilling to stipulate what our interest was, and I don't say that we would accept [569] it, but the other day he refused. So I don't see how the Court can deny the Bank, who was brought into this proceeding under an Order to Show Cause, the right of cross examination until the defined limits of the Bank's interest in all or any of this goods has been established.

In addition to that, the Bank is a secured creditor, without question, in this proceeding. They haven't filed a Proof of Claim, but I don't think that it is necessary under the law that your Proof of Claim actually has been filed, so long as there is time left within which to file it, where the records of the bankrupt present a prima facie case of interest as a secured creditor in the proceedings.

And I submit that the case—I haven't read the case cited by Counsel—has nothing whatever to do with the proceedings that we have here.

In addition to that—and I will be glad to give the Court authorities—it is my understanding that while the Trustee in Bankruptcy represents the general creditors in a proceeding, and the general creditor may demand of the Trustee that he make a certain claim or litigate a certain matter, and if he refuses the general creditor may go ahead on his own; but those cases still don't say that the general creditor may not appear in the proceeding along with the Trustee where there is no objection on the part of the Trustee, and it is frequently done.

(Testimony of Earl Johnson.)

And, furthermore, in this case we have been ordered by [570] the Court to come into this proceeding to show cause.

Mr. La Shelle: Your Honor, please, I perhaps didn't make myself wholly clear here. I will be the last one to deny that the Bank has an interest in all 9,000 barrels. They have got a very real interest in it. The question is as to the type of interest, and whether that interest gives them the right to go into this evidence.

Now, they have pleaded in their Answer certain warehouse receipts, which duplicate approximately 3,000 barrels of this merchandise. They have not pleaded any warehouse receipts duplicating the evidence in Petitioner's Exhibit 30 and 31. So that they are claiming no title there. Now, their interest in the remaining 6,000 barrels is simply this, and I'll concede their interest. Their interest is this, that if they don't get the 3,000 they're claiming with duplicate warehouse receipts, but if this proceeding can wind up so that while they don't get it, then the Trustee gets it, then of course there is more in the Bankrupt Estate to be shared by the unsecured creditors. So naturally, they have an interest there.

Schenley has exactly the same interest in the Silverado Petition, because if Schenley is thrown into the status of an unsecured creditor, then certainly it's to Schenley's interest to have the Trustee get the Silverado brandy and merchandise, so that there will be more in the pot for Schenley. So we're vitally

(Testimony of Earl Johnson.)

interested in the Silverado proceedings. However, that [571] interest of Schenley in the Silverado Petition, and the interest of the Bank in this part of this Petition is not an interest in which they can come in, because as a contingent unsecured creditor, all unsecured creditors are represented by the Trustee and the attorney for the Trustee.

The Referee: Mr. La Shelle, the Bank, not having put their case on yet, the Court is forced to naturally be bound by the pleadings. As Mr. Fisk points out, in paragraph 8 of your Petition, you say, "the Petitioner is informed and believes and therefore represents the fact to be that Anglo California National Bank of San Francisco, and so forth, claims an interest in said property adverse to Petitioner, and is therefore a proper party to this proceeding."

And in the paragraph preceding, you mention 8,933 barrels of whisky and grain spirits.

Now, in their Answer, answering paragraph 8 of said Reclamation Petition: "Admits that your answering defendant claims an interest in the 8,933 barrels of whisky and grain spirits as to which Schenley Industries seeks the surrender of by the Trustee in Bankruptcy."

Now, how can the Court at this time tell the Bank that you don't have an interest in a portion of it, but you might have an interest in another part?

Mr. La Shelle: Because at this stage of the proceedings and under their own pleadings, if you will read further—if you will read on page 2, I

(Testimony of Earl Johnson.)

think it is—page 2 of the Bank's [572] Answer, and also on page 3 of the Bank's Answer, you will look at line 16, page 2, they set out these warehouse receipts—I forget whether that's the Heaven Hill or the 574; it doesn't make any difference,—that would be the 574. Then, on page 3, they set forth the Heaven Hill duplicate certificate and claim that their certificates are better than ours.

Now, they don't claim any duplication of any of these certificates at all. So it becomes self-evident, from their own pleadings what they have set forth, that their interest can only be as an unsecured creditor. It can't be anything else.

The Referee: Not necessarily. The mere fact that they set forth that they have the following warehouse receipts, which Schenley also claims that they have, doesn't restrict them to having an interest in the balance of this.

Mr. La Shelle: Yes, but their interest is that of an unsecured creditor.

The Referee: I don't know that yet. Maybe the Anglo Bank will come up with a catch-all security that's guaranteed everything that Hedgeside has, including the Trustee. Whether it's good or not, I can't assume what Mr. Fisk's case is going to be on behalf of the Bank, they not having had an opportunity to offer any proof, yet, and I being bound as far as they are concerned with the pleadings.

Now, definitely they say, regardless of the duplicate warehouse receipts, which I will concede as far as your statement is correct, they do also state that

(Testimony of Earl Johnson.)

they have an interest [573] in 8,933 barrels of whisky and grain spirits.

Mr. La Shelle: Yes, but that interest can only be, under the circumstances of this case, the interest of an unsecured creditor.

The Referee: I don't know that, Mr. La Shelle.

Mr. La Shelle: I mean, I submit that.

The Referee: Well, how do I know? There is no form of security, other than a warehouse receipt. I don't know what the Bank has got. They may come up with a chattel mortgage or something else.

Mr. La Shelle: Well, we will submit it, Your Honor.

Mr. Fisk: In addition to that, Your Honor, a pleading doesn't limit it to affirmative allegations of the Answer. My defense is not limited to that. It doesn't have to be, because he has put in an anticipatory pleading. In addition to that, it doesn't recite the particular barrels. You have spent a good part of this proceeding so far showing that your warehouse receipts applied to particular barrels. You haven't established, nor are you willing to stipulate, as to which of these 8,933 the Bank's warehouse receipts apply, regardless of their other interests.

And furthermore, there is just one other thing I just wanted to recall to the Court's mind. Mr. La Shelle spent two days of the Court's time here, claiming that he wants a ruling out of this Court rendering *res judicata* any interest that the Anglo Bank has got in this proceeding, and that's [574]

(Testimony of Earl Johnson.)

what he expects to get out of it. He spent two days arguing on the point. That's what he says he has insisted upon because he doesn't expect any outside suits after this proceeding is over.

The Referee: Well, gentlemen, with reference to Mr. Fisk's objection to Mr. Johnson testifying on books and records that are not the books and records of Schenley's, the objection will be sustained.

With respect to Mr. Fisk's right to object on the examination of Mr. Johnson with reference to Exhibits 30 and 31, the Court's ruling in the future will be that he has that opportunity.

Now, at the moment, the Court is not aware of the documents that Mr. Johnson has in his hand making up that Exhibit.

Mr. Walsh: Off the record—

(Discussion off the record.)

Mr. La Shelle: In the interest of time, Your Honor, may it be stipulated that I need not object to Mr. Fisk right along that it will be deemed objected to upon the grounds that I made a little while ago.

The Referee: That is on all of Mr. Johnson's testimony with reference to the Exhibits 30 and 31.

Mr. La Shelle: Yes.

The Referee: You have no objection, have you, Mr. Fisk?

Mr. Fisk: No. [575]

The Referee: Mr. Walsh?

Mr. Walsh: No, I don't.

(Testimony of Earl Johnson.)

The Referee: In other words, what he is saying now, that these objections that Mr. Fisk might make, not Mr. Walsh, just Mr. Fisk on behalf of the Bank.

Mr. La Shelle: Yes, that's right.

The Referee: It is stipulated that you have the same position all along with reference to 30 and 31.

Mr. La Shelle: And that would apply to cross examination as well.

The Referee: Your position is that the Bank has no right of cross examination——

Mr. La Shelle: My position is that the Bank has no right to participate in these proceedings, insofar as it refers to the evidence of Petitioner's Exhibit 30 and 31, and I just don't want to make the objection every time it comes up.

Mr. Walsh: Now, for me, may I have the opportunity to make the objection?

The Referee: Surely.

Mr. Walsh: Your Honor, please, I make a motion at this time that the answer go out relating to the portion of it where Mr. Johnson testified that those records kept in the usual course of business on the following grounds: First, that Mr. Johnson is not competent at this time to testify how those records were kept in the New York office. [576] My second objection is that the documents which Mr. Johnson has in his hand at the present time and is reading from are not the records of the nature which come on with the Evidenciary Rule of being kept in

(Testimony of Earl Johnson.)

the regular course of business. They're not the books of account.

Mr. La Shelle: I might suggest, we can eliminate this, as far as the Trustee is concerned, I'll withdraw the question and stipulate the answer can be stricken, and I'll prove it from a different position.

The Referee: Very well. He is withdrawing the question and answer.

Mr. Fisk: As far as the Trustee.

The Referee: As far as the Trustee is concerned, but not surrendering any of your rights, as far as the Bank is concerned.

Mr. La Shelle: That's right.

Mr. Fisk: Wait just a minute, I'm a little confused. I don't see how he can withdraw that question on the ground of that objection. I'll take care of it this way: The Bank will make the same objection as the Trustee has made, in addition to the objection the Bank has already made.

The Referee: Very well, all right.

Mr. Fisk: What is the ruling on it? He withdrew the question on that ground, as far as the Trustee is concerned, but not as far as the Bank. Therefore, I make the same objection, as far as the Bank is concerned. [577]

Mr. La Shelle: You have got your objection sustained.

Mr. Fisk: That's very true, but here is the point: Here is the witness' cross examination; he withdraws the question in order to take care of an objection, apparently on the ground that the objec-

(Testimony of Earl Johnson.)

tion is good. Not an objection made on the same ground that I have objected on. He has left the answer in which has been stricken out on my objection, but not on the other. So I'd like to make an objection on that ground, too.

The Referee: Well, then, would it clarify it for the purposes of everyone? Mr. La Shelle is withdrawing the question and answer. Now, Mr. La Shelle is going to ask another question along the examination here, and the Bank is going to make an objection, and you make the objection over again on any grounds you want. Mr. La Shelle will object to your objection, on the ground that you're not a party to Exhibit 30 and 31.

Mr. La Shelle: I think that can be covered by the stipulation, your Honor.

The Referee: Well, that is what Mr. Fisk is concerned about, because it leaves the record a little in the air. I agree with him.

Mr. Fisk: You withdraw the question and answer.

Mr. La Shelle: As far as——

The Referee: You withdraw the question and answer, as far as this proceeding is concerned at the moment, and [578] stipulate that the answer go out.

Mr. La Shelle: Yes. Now, so far as what we went over with the Bank——

Mr. Fisk: The stipulation stands.

Mr. La Shelle: The stipulation is the same.

(Testimony of Earl Johnson.)

The Referee: Very well, regardless of this question.

Mr. La Shelle: Take a warehouse receipt Number 3685, which I took off the pile of Petitioner's Exhibit 30 for Identification, and eliminating the warehouse receipt, for the moment: Attached to that warehouse receipt are what purport to be a cancelled check, a voucher, a cancelled check, an invoice from Franciscan, another cancelled check, Schenley, another voucher of Schenley, another invoice from Franciscan, another check, another voucher, another invoice, another check, another voucher, another invoice, another check, another voucher, another invoice, another cancelled check, another voucher, another invoice.

Now, referring to those documents, you took everything in this group, with the exception of the warehouse receipts—I think I am correct in stating Counsel will stop me if I am not—that these various cancelled checks here are all payable to the Anglo National Bank. Now, will you explain to the Court the method that Schenley had, their established procedure in handling purchases of this kind, where they kept the various things, and whether or not they were kept in the regular course of business?

Mr. Walsh: Now, just a minute——

Mr. Fisk: I object to that, on the ground that no proper foundation has been laid.

The Referee: That statement as to whether or not they were kept in the regular course of business, I think you need a little more testimony from

(Testimony of Earl Johnson.)

Mr. Johnson before you can ask him that. Some of these documents are kept in one Schenley office, and some are from another.

Mr. La Shelle: I thought we had already covered that, but I will withdraw the question and submit what is the established procedure.

The Referee: All right, ask him what is the established procedure.

Mr. La Shelle: Q. What is the established procedure of Schenley with reference to handling purchases, and sales of this character and the preservation of the records?

The Referee: Does this witness know?

Mr. Walsh: Just a minute——

Mr. Fisk: Where, what place?

Mr. Walsh: I am going to make the objection, the proper foundation hasn't been laid.

The Referee: Mr. La Shelle, now isn't it a fact that some of these documents are from New York?

Mr. La Shelle: I don't know. I'll have to find out from him.

The Witness: Some of them are. [580]

The Referee: Some of them are from New York.

The Witness: But not on this particular Exhibit.

The Referee: I mean through here. In this transaction, maybe not. But in this Exhibit are some of the documents from New York.

The Witness: Yes.

The Referee: Are some of them from San Francisco?

The Witness: Yes.

(Testimony of Earl I. Johnson.)

The Referee: Now, does he know what the procedure is in New York, and also in San Francisco?

Mr. La Shelle: Yes, I think——

The Referee: Let's ask him.

Mr. La Shelle: I thought we covered it the other day.

The Referee: Well, counsel here says we haven't.

Mr. La Shelle: Well, all right.

Q. Mr. Johnson, you are Chief Auditor for Schenley on the West Coast?

A. Yes, that's right.

Q. And before coming to the West Coast——

Mr. Walsh: Just a minute, Your Honor, please. I am going to object to that line of questioning as highly leading. Just ask the man what he does and what his duties consist of. Don't put words in his mouth.

The Referee: You may proceed. The objection is overruled.

Mr. La Shelle: Q. Mr. Johnson, how long have you been Chief Auditor out here on the West Coast?

A. The position of Chief Auditor since two years ago in August.

Q. And before that, were you here in some other capacity?

A. I was head of the Treasury Department of the West Coast—Whisky Division of Schenley on the West Coast.

Q. And the setup there was a change of some manner or another at that time?

A. You mean, as far as my position?

(Testimony of Earl I. Johnson.)

Mr. Walsh: Just a minute, I am going to object to that question.

The Referee: Objection sustained. Leading question, Mr. La Shelle.

Mr. La Shelle: Q. Well, when you were in the Treasury Department, how long were you in that?

A. Approximately two years.

Q. About two years. And at that time, what was the difference between your work there and your work later on as Chief Auditor.

A. At that time——

Mr. Walsh: Just a moment, if Your Honor please, I am going to object to that question. There is nothing in Evidence to show what his work was.

Mr. Fisk: In either place.

The Referee: Q. What did you do before?—Sustained.

A. You mean; as Treasurer—Treasury representative?

The Referee: Yes.

A. In charge of all of the accounting functions of the West [582] Coast Whisky Division.

The Referee: And then after you transferred to some other job?

The Witness: After I transferred over to, back as Chief Auditor of the West Coast Division. I had the responsibility of seeing that all records pertaining to accounting on the West Coast Division were kept in accordance with the Schenley business requirements.

(Testimony of Earl I. Johnson.)

The Referee: Is that whisky business or all business?

The Witness: All business.

The Referee: And what did you do before you were in the Treasury Division of Schenley and in the supervising of the accounting business?

The Witness: I was sent out from the New York office to take that function over before I came out here. I was given a grounding in all of the functions of the New York office to know what the procedures and the methods and departmental set-up was in the New York office, in maintaining the various records pertaining to their business transactions.

The Referee: How long were you in the New York office?

The Witness: Approximately a month.

The Referee: And when was that?

The Witness: In 19—the beginning of 1946.

The Referee: At the time, were you in the New York office in any other capacity, other than the month you spent there? [583]

The Witness: No sir.

The Referee: When you were being grounded in procedures and so forth?

The Witness: No.

Mr. Fisk: Q. By whom were you employed at that time?

A. You mean, the name of the party?

Q. Were you employed by Schenley at that time?

A. Yes.

(Testimony of Earl I. Johnson.)

Q. As an employee of Schenley?

A. As an employee of Schenley, yes sir.

The Referee: Gentlemen, it's twelve. Is this a good time?

(Thereupon an adjournment was taken until two o'clock p.m.) [584]

Afternoon Session—2:00 o'clock p.m.

Mr. La Shelle: Your Honor, I would like to call the Court's attention to the fact that on page 509 of the transcript that all of this testimony on procedures, both in New York and San Francisco are all entered. I'll be happy to go over it again. It's all there—probably forgotten.

Mr. Fisk: Who is this by, Johnson?

Mr. La Shelle: Yes, we had to do it to get the Heaven Hill documents in.

Mr. Walsh: There, you see, Your Honor? They have taken this man, put him on, taken him off, there has been no opportunity of cross examining.

Mr. La Shelle: He was cross examined, too.

Mr. Walsh: I did not cross examine Mr. Johnson at any time. I have never had the opportunity of cross examining Mr. Johnson.

Mr. La Shelle: You have.

Mr. Walsh: No, I haven't. You show, in that transcript, where I have asked one question on cross examination.

Mr. La Shelle: I say, you have had the opportunity.

Mr. Walsh: I have not had the opportunity. I

(Testimony of Earl I. Johnson.)

have not even had the opportunity of cross examining this other witness you had on the stand. Look at your transcript. What page did you say that is on? [585]

The Referee: 509, that's the page Mr. La Shelle has shown me. Page 509 of the transcript of December 22nd. Mr. La Shelle, I have read it very hurriedly, but how does this change the situation that existed prior to the recess at noon?

Mr. La Shelle: Well, he has given all the established procedures of Schenley in New York, San Francisco. He has done that.

Mr. Fisk: You are the one that is asking——

The Referee: Wait a minute, just a minute; I see here he is talking about the West Coast. (Reading):

“I know what is required out here on the West Coast, as far as support for payment. So that if any question comes up at any time in connection with the payment through normal operating procedure of the Company, I know what source I have to go to, to get the original support for the payments which have been made.” That's from 510.

Mr. Walsh: “Continue on.” I ask that that be stricken from the record.

The Referee: Wait a minute, Mr. Walsh. Even before that. Now, on 509: (Reading):

“A. Well, we operate on the West Coast, the Schenley Whisky Division, we operate as a branch for them, as an individual unit. In other

(Testimony of Earl I. Johnson.)

words, [586] every payment which is made subject to review by the New York office, Accounts Payable Department or clearance. Although we have people who are authorized to draw checks, and the payments will stand up based on authorizations out here on the West Coast, everything is subject to review in the New York office, so that when documents are prepared out here, the normal procedure calls for a copy of those documents, in many instances the original documents, to go to the New York office. However, the files in the Accounts Payable Department out here, which supports payments which have been made, are copies, except that they are duplicates of original information which has been cleared here and then transmitted to New York.”

Now, where is there anything in here that says anything about the witness knowing about the New York setup?

Mr. La Shelle: It's all in here. Here is where I went into testimony of the New York office, and then Mr. Walsh objected and said we were cluttering up the record about New York. It's all in there. It goes over a number of pages.

The Referee: Page 511 now. (Reading):

“Mr. La Shelle: Now, with reference to purchases made, not on the West Coast, but purchases made in New York, do you know what that procedure is as far as preserving documents? [587]

(Testimony of Earl I. Johnson.)

“A. Yes, I do.

Q. Tell us what that is.

A. I wasn't in the New York office.

And then: (Reading):

“The Referee: Just a minute, now. Without an objection; how will we be interested in the procedure in the New York office?”

Mr. La Shelle: Well, Your Honor, if I may show you here, this is number 11 for Identification. That's the original invoice of Heaven Hill, and that's the cancelled draft of Heaven Hill and Schenley, and that's the copy of the so-called 'Letter of advice', two vouchers. Then there is the cancelled draft. This was a New York transaction between Heaven Hill in Los Angeles and the New York office, and we sent to New York for these documents.

Mr. Walsh: Your Honor, please, in the interest of time and saving the record, all that Mr. La Shelle has to do is to hand the witness the document and ask him what it is and identify it. It shows on its face that it was paid by Schenley or not. That's all you are interested in.”

Mr. La Shelle: It spreads out over quite a few pages.

Mr. Walsh: Mr. La Shelle states that this is preliminary. Now, he still has this witness on the stand, and [588] he calls it preliminary, and I submit, Your Honor, that our objection is good.

The Referee: I'm still reading it.

(Testimony of Earl I. Johnson.)

Mr. La Shelle: It will be the third time he has gone into it. I'll be happy to do it again.

Mr. Fisk: We are objecting to your doing it again.

The Referee: Just a minute, now. Well, I don't see any of these following pages that is of assistance to the Court at the moment. There has been an objection now with reference to the books, records, and documents kept in the regular course of business in the New York office, and the witness on the stand, not necessarily Mr. Johnson—I haven't objected, but he stated that he didn't know anything about the New York Office. Earl Johnson.

Mr. La Shelle: Well, perhaps it will be quicker—

The Referee: Just a minute, now, so we will be in the clear.

Mr. La Shelle: Shortly before the Heaven Hill documents went into Evidence.

The Referee: Well, Earl Johnson on the stand, on page 510, he makes a statement that "I know what is required as far as support for payment." I haven't found anything in the transcript—if I can be shown, I'll be glad to change my opinion—but I don't see anything in there where Mr. Johnson states his familiarity with the New York operations. I can see what he says about New York having a check on their [589] operation out here and all those things.

Mr. La Shelle: (Indicating)

The Referee: Page 511. (Reading):

"Mr. La Shelle: Now, with reference to pur-

(Testimony of Earl Johnson.)

chases made, not on the West Coast, but purchases made in New York, do you know what that procedure is, as far as preserving documents? A. Yes, I do.

Q. Tell us what that is.

A. I wasn't in the New York office."

Mr. La Shelle: I know, but read the last of it where he finally tells you later on, on that page and the next page and page 512. I'll be glad to do it again.

The Referee: Mr. La Shelle, I am not arguing the point with you, but what are we going to do—accept the transcript, or ask the witness? He says, "I wasn't in the New York office". I mean, that's his answer.

Mr. La Shelle: I know, but he is interrupted, and there, you see: "Just a minute, now, without an objection: How will we be interested in the procedure in the New York office?"

Mr. La Shelle: Well, Your Honor, if I may show you here, this is Number 11 for Identification; that's the original invoice of Heaven Hill, and that's the cancelled draft of Heaven Hill, and that's the copy of the so-called "letter of advice", two vouchers. Then there is the cancelled draft. This was a New York transaction [590] "between Heaven Hill in Los Angeles and the New York office, and we sent to New York for these documents."

Then he went on and told about the procedure here, and they were introduced in Evidence.

The Referee: Show me about that. That's what

(Testimony of Earl Johnson.)

I want to know. He says, he wasn't in the New York office. I don't think there is anyone here that disputes the fact that some of these documents were obtained from New York and from the New York office of Schenley. The objection raised by the attorney for the Trustee and the objection raised by the attorney for the Bank is whether or not the witness on the stand is in a position to testify as to the procedure and the documents, and so forth, in the New York office.

Mr. La Shelle: Well, we'll go ahead. We don't want to argue over the record any longer. We will go ahead and develop it.

Mr. Fisk: If Your Honor please, I don't want to prolong this discussion, but it is decidedly pertinent. On page 526 of the transcript, all of this discussion that the Court has been reading resulted in a determination by the Court that this witness knew nothing except that he had taken certain documents out of the San Francisco files, and as a result of that the Court did not receive in Evidence the documents that Counsel was offering at that time, which you will find by turning to page 534, and those documents aren't yet in Evidence and on that account. [591]

Mr. La Shelle: What documents are they?

Mr. Fisk: The warehouse receipts.

Mr. La Shelle: Oh, those are the warehouse receipts. Well, I think we will move quicker if we just go ahead.

The Referee: Very well.

(Testimony of Earl Johnson.)

Mr. La Shelle: Q. Mr. Johnson, you stated that you spent a month in the New York office, as I recall it, learning procedures before you came out here? A. Yes sir.

Q. And will you tell us what your training was there with reference to the established procedures of Schenley?

A. Well, I was hired on specifically by the New York office, by the Treasurer at that time and the Chief Accounting Officer, to assume the responsibility as Treasury Representative of Whisky Division on the West Coast. Having not had any experience in Schenley's procedures prior to that time, I was required to spend approximately a month in the New York office, going throughout the various departments, going over the various procedure manuals, which generally specify what requirements pertain to various business transactions, what required supporting documents must be maintained for the Company records in order to support, for instance, payments, transactions, such as transfers, adjustment, inventories, et cetera.

And in order to carry on the function as West Coast Treasury Representative, I had to have a fundamental knowledge of all the operating departments, accounting department [592] treasury-wise in New York—

Mr. Walsh: Just a moment, Your Honor, I ask that last statement go out as a conclusion of the witness.

The Referee: So ordered.

(Testimony of Earl Johnson.)

The Witness: All right; Schenley has certain standard procedures which they require all operating units to follow——

Mr. Walsh: Just a minute, Your Honor, please, I am going to ask that answer go out as not the best evidence.

Mr. La Shelle: I state that's within the witness's knowledge.

The Referee: I will reserve my ruling with reference to that going out or not——

Mr. Walsh: Well, Your Honor, please, may I make a statement on that?

The Referee: Yes, Mr. Walsh.

Mr. Walsh: In other words, if there are certain standards or procedures, this witness's testimony is incompetent. They should produce the documentary evidence showing those record procedures. He makes a conclusion that there are certain standard procedures.

The Referee: Mr. Walsh, that's the reason the Court said that it would reserve its ruling on it, knowing that that was the basis of your objection; but at the same time, in an attempt to speed this matter up, and in the event that it's only preliminary, why, I permit it to go in. But in the event that it becomes important, as far as his testimony is concerned [593] with reference to what their standards are, then I say they're correct. They are entitled to see what the standards are.

Mr. Fisk: May I make this objection in that connection, Your Honor? I would like to make the same

(Testimony of Earl Johnson.)

objection on the ground that this witness has testified that the practices and procedures followed by the New York office are set forth in the West Coast office, too, in certain documents in possession of that Company, and that he went there for the purpose of familiarizing himself with those instruction books, so to speak.

Now I object on the grounds for him to testify as to the contents of the instruction books is not the best evidence.

The Referee: Before ruling on that, Mr. Fisk, Schenley's have a manual of accounting procedure.

The Witness: They have numerous manuals.

The Referee: They have a manual that, using the layman's language, would be the Bible for you to follow and all accountants to follow, whether they are in New York or San Francisco, isn't that true?

A. It's a highly sectionized manual which you could——

The Referee: Q. But regardless of how technical it is, they do have a manual?

A. Yes.

Q. That you must follow, and you can't deviate from it, as far as the specific things that are set forth in the manual [594] is concerned?

A. That's right.

Q. Is the manual available, or the group of manuals?

A. There's a group of manuals which are issued from time to time, and they're superseded and changed, and in connection with any other type of

(Testimony of Earl Johnson.)

transaction there may be numerous manuals, which are numerous procedures which pertain to a transaction of that nature or connected with that.

Q. Let me ask you this: Supposing you had a transaction such as we have here, where we have a group of transactions with reference to these warehouse receipts and purchasing spirits or whisky in a bonded warehouse and invoices and paying checks, and so forth and so on, where would you go to find the correct procedure to follow?

A. That's pretty difficult to say, Your Honor.

The Referee: Q. Well, if you can't answer my hypothetical question, you give me your explanation, and then I'll ask you something.

A. All right. My accounting procedures, both with Schenley and other Companies, are from an accountant's standpoint accepted procedures. The only thing that a manual in accounting procedure in Schenley, or any other audit that I know of that I have done in connection, would be to qualify certain phases of accounting procedure, if there were additional requirements. It's a standard from an accounting standpoint in order to support payment of a bill. There are certain requisites before any Company will expend their money. [595] Those types of references are not generally set forth in any manual. They're known from training and from past practice in the Company.

The Referee: Q. Well, Mr. Johnson, if you were going to testify as to what the practice was in the

(Testimony of Earl Johnson.)

Schenley office in New York, what would be the basis of your answer?

A. I would say that my training as an accountant first, supplemented by a complete review of the way in which they handled their general transactions in New York, supplemented again by procedures or procedure manuals which specify certain requirements in the event of a particular type of transaction. It would be a combination of those three things.

Mr. La Shelle: Your Honor, I would like to state that simply the purpose of this testimony is to certain established procedures of Schenley's pertaining to the New York office and also this office.

The Referee: But Mr. La Shelle, let me interrupt you. I have an objection here, whereby the objecting Trustee and the objecting respondent, Anglo Bank, are concerned about Mr. Johnson testifying as to what the procedures are in New York, number 1; and they are also objecting on the ground that Schenley has a manual that is to be followed, then they would prefer to have the manual rather than to have Mr. Johnson testify.

Mr. La Shelle: Then they would want something else. What my offer of proof is, I intend to prove by this witness [596] that he knows by his own experience and training in New York office and his work out here of established procedures they have in preserving documents in supporting payments and purchases of this nature. He knows those by his own knowledge.

(Testimony of Earl Johnson.)

The Referee: Does he know more than the manual?

Mr. La Shelle: Well, as the witness has stated, Your Honor, the manual doesn't cover every phase of it. Most of it is standard accounting practices, but he knows what the Company does. Now, we have got certain documents here in the form of cancelled checks, invoices, and what-not. The purpose of this testimony is to show he knows what the established procedure is. Now, when a man knows what the established procedure is, and he knows that certain checks and invoices should be in a certain place in the Company records, he goes to that place and gets those records, and here they are.

Mr. Walsh: That's just it; he didn't get it.

Mr. La Shelle: And that follows the Business Records Act. No large company, Your Honor, could ever produce every witness that has handled every single one of those documents. I might have to have 50 or 60 witnesses from all over the country on it.

The Referee: Mr. La Shelle, that's not necessary. I mean, if you still go back to the overall objections made by the Trustee and the Respondent Anglo Bank, their original contention was that some of these Exhibits in 30 and 31 are [597] not documents that were kept in the ordinary course of business of Schenley's. That's their original objection, is that correct? Is it?

Mr. Walsh: That's the first objection, yes.

The Referee: Well, ask the gentleman.

Mr. Fisk: That's right.

(Testimony of Earl Johnson.)

The Referee: That was the original statement that they made as to how Mr. Johnson should be in a position to tell with reference to documents that are not documents in Schenley's here on the West Coast Number 1, not documents or records kept in the regular course of business.

Mr. La Shelle: Well, we are attempting to prove that they are, Your Honor. We are attempting to prove that they are kept in the regular course of business. It couldn't be anything else.

The Referee: Well, in the regular course of business in what office?

Mr. La Shelle: In the Schenley organization.

The Referee: Where?

Mr. La Shelle: Both here and New York, because the witness has testified that certain documents on a purely local transaction have to go to New York when they're closed.

The Referee: So the Respondents want to know what he knows about keeping the records and documents and the accounting procedure in New York, so they'll know whether or not these— [598]

Mr. La Shelle: That's what I am trying to develop, but I can't seem to get started.

The Referee: We'll give you another chance, Mr. La Shelle.

Mr. La Shelle: Q. Well, now, Mr. Johnson, with reference to purchase and sales in the regular course of business, purchase and sale of bulk whisky or bulk spirits, from any source whatsoever—we will take the West Coast first—a local transaction here,

(Testimony of Earl Johnson.)

if an invoice comes in from somebody that Schenley wants to purchase whisky from, will you tell the Court the established procedure that is followed here on the West Coast, and what, if anything, you sent as a result of that to New York?

A. I might be able to back into it a little better than I can on it direct.

Mr. Walsh: Your Honor, please, I am going to make this objection: In the question propounded by Mr. La Shelle there is a statement that, in the regular course of business—There is no foundation made as to what the regular course of business of Schenley's is, respecting the certain whisky transaction. We haven't that in Evidence at all.

The Referee: Well, I assume that Mr. Johnson is going to testify as to how this particular transaction on the West Coast would be handled if it was a similar situation as we have here on one transaction. Is that your question?

Mr. La Shelle: That's it. [599]

The Referee: If Mr. Walsh has made an objection, it is overruled.

Confine it to the West Coast on an individual transaction.

The Witness: On the West Coast we have, generally speaking three types of Accounts Payable transactions, where we disperse money. First and most predominantly, we have the transaction where a request for a purchase order is issued. Our Purchasing Department make contact with a vendor in order to obtain that merchandise. When the mer-

(Testimony of Earl Johnson.)

chandise is delivered, a receiving report is made up in support of that delivery. We obtain an invoice from the vendor covering that merchandise. Our Accounts Payable check the receiving report, the copy of the invoices received from the vendor, and a copy of the purchase order, to see that everything is in agreement with what was ordered in the first place. If that is found to be in order, a check is drawn, approved by the necessary approvals, which may vary on the West Coast, check is drawn and issued to the vendor in payment of that particular invoice, and the supporting documents to that are filed—let me state that all of the supporting documents, with the exception of the check, which is an original, and an only document, copies of those documents are forwarded to the New York office.

Now, in some instances, it may be copies; it may be originals in other instances, depending upon the particular transaction. So there is a complete set of documents [600] pertaining to every sale of that nature maintained in New York office for our records as well as on the West Coast. So that, just bringing it on a little further, if there should appear to be a document lost on the West Coast, I can go to the New York office and know that I can obtain a duplicate set of documents so that I can have them photostated. I know what they have and where I have to go in order to obtain them. Now, that was the first type of transaction.

Secondly, we have contractual obligations or contractual commitments which are made for the pur-

(Testimony of Earl Johnson.)

chase of materials. It may be merchandise, it may be supplies, or various and sundry, where our contracts supersede or take the place of the purchase order. In that event, we require that there be a copy of a vendor's invoice again. That is checked out—also there would be a copy of a receiving report or a document replacing the copy of the receiving report. The receiving report is generally made out if the materials are received on the premises. In lieu of that receiving report, and I can cite in this instance, in the case under question now, superseding or replacing that receiving report, would be the warehouse receipts.

In support of payment, then, in the case of a contractual obligation, we have a reference to a copy of a contract, we have a copy of the invoice issued by the vendor and a copy in this instance—it may vary, as that may be called for by contract—but in this instance, a copy of [601] the warehouse receipt. Now, the warehouse receipt in itself is an original and an only document. If the transaction——

Mr. Walsh: Just a minute, Your Honor——

Mr. Fisk: I am going to interrupt and ask that the portion of his answer go out, when he starts to state the procedure in this instance. As I understand, he is now testifying as to the West Coast practice generally on three different types of transactions, and in this——

The Referee: So ordered, Mr. Fisk.

Mr. Johnson, give us the West Coast practice generally, and you have specified that there were

(Testimony of Earl Johnson.)

three different—generally three different types of transactions, so continue with that.

The Witness: In the West Coast office——

The Referee: You just finished talking about the contractual transaction, when there was a warehouse which, in effect, would be the same as the first one when there was a check. Now, continue on.

The Witness: Off the record, Your Honor. The only thing I wanted to bring in——

Mr. Walsh: No off-the-record.

The Referee: We are on number 2. The warehouse receipt transaction, instead of the original check testimony, and we're on number 2 where there is a contract and warehouse receipt.

The Witness: Now, in our Accounts Payable Department, [602] a check is made against the contract, we obtain a copy of the vendor's invoice and a copy, or we obtain in this instance for serving the purposes——

Mr. La Shelle: Don't say, "in this instance".

The Referee: That is the point. We are just talking about hypothetical cases in the West Coast, the three kinds.

The Witness: If I eliminate the term, "Accounts Payable Department", then I mean in our West Coast office, then——

The Referee: The thing we don't want you to do, Mr. Johnson, is to specify that any one of these three particularly applies to the case that is now under discussion. Just tell us generally the three types of transactions that you have. One, where the

(Testimony of Earl I. Johnson.)

vendor sells so-and-so, and it's paid by check; number two, where there is a contract—see, eventually there is a warehouse receipt—

Mr. La Shelle: If I may make this suggestion, when you want to refer back, instead of saying “in this instance”, say “in such instance”.

The Referee: Yes.

The Witness: Well, in such instances, either a warehouse receipt or some similar document would be used as support, as final support of any payment made under contractual obligation. The third type of transaction—I don't think we will be affected by it here, but to bring it out, we have letter forms of contracts, which are agreements between parties, they're [603] not entered into as a formal contract, where you have officers of the Company, and so forth, involved; but they are agreements generally for services, or, for instance, we have services taking care of our typewriters, and so forth, which are entered in by Department heads, and so forth, on the West Coast, that go into by letter agreement, and in those instances we require that we have some form of letter agreement. We have a copy of the vendor's invoice, and when the services are performed or supplies received, and so forth, the representative department head of Schenley's finds that such-and-such work has been done.

Now, those—in each instance, I think, I have cited, there are three basic documents and they evolve themselves into a fourth document, which is

(Testimony of Earl I. Johnson.)

a check in payment for the services, are required on the West Coast—is that—

Mr. La Shelle: Q. Now, taking the, I think the second one that you mentioned, where there is a contractual obligation, you are purchasing something under contract in such a classification, when the vendor sends in an invoice and it goes through a bank with a sight draft, with warehouse receipt invoice attached, will you tell the Court what procedure is followed as to the completion of that transaction, what supporting documents, if any, are kept, and where, and if they're kept in more than one place how they are kept and where? In other words, what are the mechanics of handling that?

A. Well, as I said, it isn't always necessary we have a warehouse receipt. That is one of the classifications or one of the things which we—

Mr. Fisk: I ask that go out as not responsive.

The Referee: It may go out. We are talking about the second classification that you gave.

Mr. La Shelle: Q. In other words, if I may—

The Referee: With the warehouse receipt.

Mr. La Shelle: Q. If I may reframe the question again, you have the second class involving a contractual obligation. Under that contractual obligation, the vendor draws a sight draft on Schenley's, with a warehouse receipt and invoice attached; will you tell us the mechanics of handling that, how it's paid, what is done with the supporting documents, if any, and where they go and how they are preserved, how you check them to see whether the

(Testimony of Earl I. Johnson.)

invoice should be paid and the draft should be honored, and what is done? What is the established procedure in that connection?

The Referee: If I might add to Mr. La Shelle's question, start right from the time that there was a contract under number two, for the purpose of material or supplies or anything else on the number two deal, what happens?

The Witness: All right. When a contract is issued, you have to go back to the origination of the contract, because your contracts are various, and they require in some instances changes of requirements, require supporting [605] documents or the method, or the final resting place of the supporting documents. When a contract is prepared by our Legal Department, it is generally prepared in several copies. There is a copy maintained, of course, in our Legal Department out here, and there are abstracts of that contract which are drawn off and issued to all who might be interested in that contract. I repeat, a copy of all contract digests——

The Referee: Pardon me, when you say here, "all who might be interested", you are talking about Schenley departments?

The Witness: That's right, Schenley West Coast Departments, I am restricting it to that now. I receive a copy of all abstracts; in the event that there is a contract which is subjected to audit, which we have in many instances, I call for a complete copy of the contract and use that in my audit work,

(Testimony of Earl I. Johnson.)

rather than use the abstract of that contract. Now, in the type of—

The Referee: Pardon me a minute, what do you call an abstract of the contract?

A. It's a short form digest, where we take the—

The Referee: Q. Made by whom?

A. It's made by our—in some instances, our Legal Department out here. Now, all of the digests of that nature are made by New York.

The Referee: Very well. Go ahead.

The Witness: In the type of contract which Mr. La Shelle [606] has brought out, if the requirements were that a payment be made on the basis of sight draft, we have to require, if it's stipulated in the contract, that before final payment is made, that we have in support of that payment in our offices here on the West Coast the three major types of supporting documents, which I have already quoted. The checks may be issued or the checks may be drawn before we have that first support, but before the check is finally issued in payment to the vendor or whoever is designated in this case, I believe we stipulated the Bank, before that is made, we have to have full acknowledgment that we are going to have those three types of supporting documents we already have—

Mr. La Shelle: Let me stop there, if I may. Let's assume that under a contractual obligation to buy something and the vendor utilizes a system of drawing a sight draft on Schenley with warehouse receipt and invoices attached, when Schenley gave you

(Testimony of Earl I. Johnson.)

notice of the draft at the bank, exactly what is done? Take it step by step.

A. Either according to the terms of the contract stipulating—if it's a quantitative purchase, and so forth, or by a copy of the vendor's invoice received, we determine in our Accounts Payable Department what the amount of the payment should be, covering that particular merchandise. On the basis of approvals, which are required under that contract or by designated approvals on the West Coast, as it might be, there are certain authorized signatures or check where the [607] approval must be obtained. A check is drawn for the amount of the invoice, the invoice is checked, extensions, additions, and so forth, and then the check is drawn on a request made by the recipient of that invoice. The check is drawn and taken to the bank, and upon the surrender of the documents in question, which are going to be our support for that payment made, those documents are surrendered by the bank, and the check and payment is turned over to the bank.

Q. Now, before the check is turned over to the bank, is any comparison made between the invoice that Schenley has and the invoice that the Bank has? Does anybody go over there to check that under that system?

A. In the type of transaction which you are citing, Kirk, the bank would furnish Schenley with notification that they did have these documents on hand. Before the check was actually drawn, some representative of Schenley might be in our Ac-

(Testimony of Earl I. Johnson.)

counts Payable Department, might be in our Cashier Department, depending on what has been required, would go to the bank and ask to see the documents, would be able to inspect or see that they agreed in amount with the copy of the documents which had been forwarded to us.

Now, in many instances the bank would have more than one copy of an invoice. They would have an original and a duplicate copy of that invoice, and the bank would, when they received these upon notification to Schenley, would turn over to the Schenley representative a copy of the original invoice, which [608] they are holding, with the copy of the warehouse receipt attached, to the Schenley representative. That would be taken and checked by the Schenley representative, and if it was in agreement with the amount which had been already checked by our Accounts Payable Department, check would be drawn, turned over to the Schenley representative, brought back to the bank, the bank upon surrender of our check to the bank,—the documents being held by the bank would be turned over to our representative.

Q. All right, now, assuming that you have got up to that stage, and under a transaction of that nature, you have given the bank a check in exchange for the warehouse receipt and the invoice, so you have then the supporting papers and your warehouse receipt, and if copies and the invoice, in due course, I take it, you get the cancelled check back?

A. That's right.

(Testimony of Earl I. Johnson.)

Q. All right. So then, following the completion of the transaction, by the end of the month sometime when the cashed checks come through, then you have a cancelled check, an original warehouse receipt, maybe some copies of that, and a number, two or more copies of the invoice?

A. That's right.

Q. And you also have, I think you call it, a voucher?

A. A voucher.

Q. And what is the voucher, just explain that to the Court.

A. The voucher—when a check is made up, it's only one [609] check. In support for distribution purposes, coding purposes, inter-company transactions, showing to the various departments for entry into their books, there's certain coding information contained on there, which shows on the details of the check, it's a copy of the check, in effect, and it's typed—the top part of the voucher, particularly, is an exact copy of the check. That is here, so that we have complete information in the files as to the check; while the check is attached to that, we have attached to that all the supporting documents. That's our key document, up until the time the check is returned. The check, for internal control purposes, never gets back to the Accounts Payable Department. That is retained in a separate file, and that happens on the West Coast operations—the checks which are returned by the banks come to my immediate attention. They are held by my Department.

(Testimony of Earl I. Johnson.)

Q. Now, we have reached the stage where this hypothetical transaction is closed and you have got a cancelled check, and you have got an original warehouse receipt, and one of those copies of it and a number of duplicate invoices and a voucher. Now, with reference to preservation of those documents, if the warehouse receipt is a receipt, say, for bulk spirits of some kind, where is that kept?

A. That's kept in our Production offices at 850 Battery Street, San Francisco.

Q. And with reference to the supporting documents consisting [610] of the cancelled check, the voucher, and the duplicate invoices, what is the established procedure as to their preservation?

A. The cancelled check, upon return from the bank, is kept within the Internal Audit Department files under our control at all times. The remaining documents are kept in the Accounts Payable Department at 900 Battery Street, San Francisco.

Mr. Fisk: The remaining document being what—enumerate them?

The Witness: First, a copy of the voucher, the copy of the invoice—now, in the case of a contract, there may be correspondence in connection with the transaction, there may be coding—supporting coding documents, which have no connection actually with the transaction, which are important for inter-company purposes, and they will have in the Accounts Payable Department either copies of the contracts, or abstracts of the contracts, pertaining to those payments.

(Testimony of Earl I. Johnson.)

Mr. La Shelle: Q. All right, now. With reference—that's a local transaction here on the West Coast.

The Referee: Pardon me, Mr. La Shelle.

Q. Now, is that a complete picture of the transaction under number two on the West Coast?

A. Yes, in the type of transaction which Kirk asked about.

Q. Mr. La Shelle asked you about, and also with the three generalizations that you gave before.

A. That's right. [611]

Q. But just as far as the West Coast is concerned? A. That's right.

Mr. La Shelle: Q. Now, with that West Coast transaction that we have just been talking about, it's complete out here, but are any of those supporting documents sent to New York? A. Yes.

Q. Tell us what about those.

A. Under Schenley procedure, the New York office obtains copies or facsimile copies of all contracts which we enter into. They're maintained—in fact, the original copy today of those contracts are maintained in our New York Cashier Department. Abstracts of all contracts are turned over to the Accounts Payable Department and other interested Schenley departments in New York. The New York office has the right to, and does, review all transactions which are made on the West Coast; all payments which are made by the Accounts Payable Department. Every payment made by the Accounts Payable Department is entered on a check register,

(Testimony of Earl Johnson.)

a copy of which goes to the New York office, and in support of every entry on the check registry, there are submitted to the New York office a copy of the voucher, a copy of the vendor's invoice or, if we cannot obtain a copy of the—no copy of the vendor's invoice, one for our files and one for the New York, in certain instances there would be a copy, a facsimile copy taken of that invoice. Generally, the original goes to the New York office; the facsimile is kept here. The checks on [612] all West Coast transactions since December, 1948, are maintained by the Internal Audit Department on the West Coast. Prior to that date, the checks were submitted to the New York office Internal Audit Department.

Q. You mean the cancelled checks?

A. The cancelled checks.

Q. Now, with reference to a contractual obligation for the purchase of something like bulk spirits under a contract, in which the transaction was made between the New York office of Schenley and of the vendor, do you know what the established procedures are in the New York office?

A. Yes, I do.

Q. And will you explain that to the Court in the same manner that you explained the local transaction?

The Referee: It's five after three.

Mr. La Shelle: Do you want to take a recess?

(A brief recess was taken.)

After Recess

(The last question was read by the reporter.)

(Testimony of Earl Johnson.)

Mr. Fisk: May I make an objection on the ground it's ambiguous as to what is meant by "transaction".

Mr. La Shelle: I think perhaps I'll have to reframe the question. I'll reframe the question.

Q. Under the second classification that you mentioned of a [613] contractual obligation, where there is a contractual obligation to purchase something in the nature of bulk spirits here on the West Coast, and the contract either calls for the transaction to be between the New York office of Schenley and the vendor, or it is handled that way; in other words, the mechanics don't go through the local office but are between the New York office of Schenley and a vendor; what is the established procedure in handling that?

A. I could shortcut it by saying it's the same practice as we handle—the same method or the same practice is handled as we handle out of our San Francisco office. Is that sufficient, or do you want me to go——

Q. Well, I think you better go into it a little more. In other words, what does the New York office do? We found out what you do locally. What does the New York office do?

A. The New York office requires the same type of supporting documents that the San Francisco office does. In other words, there would be first your prime document, the contract or a copy thereof; secondly, there would be a copy of the vendor's invoice; third, there would be a copy of the warehouse

(Testimony of Earl Johnson.)

receipt or the equivalent thereof, as required by the contract or by general practice. If similar transactions were entered into by the New York office as the type of transaction which pertained to the San Francisco office, the bank, upon receipt of the warehouse receipt and copies of the vendor's invoice, under sight draft, would notify [614] Schenley that they were holding such-an-such documents, and that payment upon surrendering of payment to the bank that such-and-such documents would be surrendered to the Schenley representatives. The Schenley representative of the New York office would go to the bank, obtain a copy of the vendor's invoice, and after checking that copy of the vendor's invoice to the supporting documents already held in the Accounts Payable Department in New York, having the extensions, the footings, checked, and see that the items shown on the invoice correlated to the requirements of the contract, they would request that a check be drawn for the amount of the invoice, the charges, or original—the sight draft, if it covered more than one invoice.

Then they would take those documents, the check principally, bring that to the bank, turn it into the bank, and receive the original documents consisting of the warehouse receipt and the original copy of the invoice from the bank, and that would be held in the New York office. In this case the warehouse receipt would be held in the Cashier Department in New York, the support for payment consisting of the copy of the voucher and the supporting docu-

(Testimony of Earl Johnson.)

ments to that voucher, with the exception of the cancelled check, would be held in the Accounts Payable Department in New York.

The cancelled check, upon return by the bank, would be held in the New York Internal Audit Department.

Q. Now, with reference to Petitioner's Exhibit Number 30 and 31, [615] did you assemble those documents at my request? A. I did.

Mr. Fisk: May I interrupt you, Mr. La Shelle, at this point? I think, Your Honor, that in the interest of orderly procedure, that we should have the right of examining the witness on voir dire at this time as to what he just testified to, before Mr. La Shelle offers these documents.

I assume you are leading up to offering the documents?

Mr. La Shelle: I am not going to offer the documents today, and I am not going to offer them by this witness.

Mr. Walsh: We are still entitled to examine him on that.

Mr. Fisk: I thought if he was going to offer documents, on the voir dire I would be entitled to clarify, in my own mind at least, testimony of the witness regarding these three methods.

Mr. La Shelle: This witness, alone, cannot qualify all of the documents; he can qualify some of them, but—

Mr. Fisk: But you are going to offer some of them, are you not?

(Testimony of Earl Johnson.)

The Referee: But Mr. Fisk said, but you are going to offer some of them while this witness is on the stand.

Mr. La Shelle: No.

The Referee: Off the record.

(Discussion off the record.)

The Referee: Mr. Walsh, on behalf of the Trustee, you [616] have heard Mr. La Shelle's statement that he is not going to offer any. Now, with that statement, the Court bearing in mind that Mr. Johnson has just testified as to the three methods, the three transactions, are you willing to waive your cross examination with reference to the methods that Schenley uses on the three particular types of transactions, both on the West Coast and on the East Coast, until Mr. La Shelle goes further with his examination?

Mr. Walsh: Well, I am willing to reserve my cross examination until he has finished with the witness.

The Referee: Mr. Fisk, now, you are not——

Mr. Fisk: I would prefer to do it now, but if Mr. La Shelle objects, I will defer it.

The Referee: Very well. You may proceed, Mr. La Shelle.

Mr. La Shelle: All right, now.

Q. With reference to Petitioner's 30 and 31, consisting of these various documents, did you assemble those at my request? A. Yes.

Q. And——

(Testimony of Earl Johnson.)

The Referee: Off the record.

(Discussion off the record.)

Mr. La Shelle: I intend to show that, with reference to these two groups, that pursuant to my request, that he assembled these documents; that, following the established procedure of Schenley to find these documents, he went to where they should be under the established procedures, and there he [617] found all of these documents where they were supposed to be. The documents consist of cancelled checks and vouchers and invoices, and what-not, as well as the warehouse receipts. Now, I realize that that testimony alone cannot qualify the warehouse receipts, in view of the objection heretofore made as to due execution. I'll have another witness to qualify the due execution of the warehouse receipts, and I'll also have another witness for these letters. This testimony will be limited to the Schenley records of cancelled checks, vouchers, invoices; under the Business Records Act, we will contend that they are admissible in Evidence. That's roughly what I intend to go into, and I thought it might be some help to the Court if I told you.

The Referee: And that's just what I thought you were going to ask, and it would have to be on the assumption based on established business practices, and so forth, of Schenley. You have got these records, and so forth and so on, which is just the point that I am concerned about, that Mr. Fisk and Mr. Walsh would like to cross examine Mr. Johnson with reference to the practices and the business

(Testimony of Earl Johnson.)

methods of Schenley on these particular types of transactions.

Mr. La Shelle: If the Court thinks it would be helpful, I have no objection.

The Referee: Is that the very point? They are going to immediately object when he says something about established business practices of Schenley's, and they are going to say, [618] "Well, we haven't had an opportunity to cross examine him on the established practices of Schenley's." Is that right?

Mr. La Shelle: Surely. In my opinion, there are gaps in the papers.

The Referee: Well, at this time, with reference to, first of all, qualifying Mr. Johnson, and, secondly, with reference to his hypothetical explanations of the three particular types of transactions, unless you have something further to offer, I am going to afford Mr. Walsh and Mr. Fisk an opportunity to cross-examine Mr. Johnson with reference to those three particular types of transactions—where the records are kept, where they go, what Schenley and their representatives—

Mr. La Shelle: In other words, it would be a voir dire examination of that particular phase of his direct.

The Referee: Correct. Now, if Mr. Fisk proceeds first on the cross examination, it is still understood and stipulated that Mr. La Shelle has reserved his objections with reference to the Anglo cross examination with reference to 30 and 31.

Mr. La Shelle: That's right.

(Testimony of Earl Johnson.)

Voir Dire Examination

Mr. Fisk: Q. Mr. Johnson, regarding the second matter that you have testified to, that is employed on the Coast, that is where there is a production written contract, and subsequently there is production and sales made by the producer to Schenley under that contract, and the transaction [619] handled with the local office in San Francisco; if I recall your testimony correctly, you said that oftentimes in the transaction, where there was a sight draft with papers attached at the bank, notice given to Schenley by the delivery of—or notice of the existence of the sight draft there at the bank—that oftentimes there were a number of copies of the warehouse receipts? A. No.

Q. Well, you said, both in your answer, if I remember correctly, and Mr. La Shelle in his question, that at times there were a number of copies of warehouse receipts?

A. That was a mistake, if I said it. It was invoices which I referred to.

Q. Well, now, before we leave the warehouse receipts, would it be a copy of the warehouse receipt, or the original warehouse receipt at the bank?

A. It would be the original warehouse receipt at the bank.

Q. And no copy of it? A. No.

Q. In other words, all that Schenley received when it delivered its check to the bank was an original warehouse receipt? A. No.

Q. Along with other papers?

(Testimony of Earl Johnson.)

A. Along with other papers, yes.

Q. But there were no copies of that warehouse receipt? A. No.

The Referee: Mr. Fisk, for the purpose of clarity, [620] your statement with reference to Mr. La Shelle's question to the witness is exactly the same as my recollection.

Mr. Fisk: No question about it.

The Referee: I mean, in other words, the record will bear that out, that Mr. La Shelle will ask him, with reference to warehouse receipts and copies of warehouse receipts, and when the witness answered he did not eliminate any copies or——

Mr. La Shelle: I think I did use that, although it may have been inadvertent.

Mr. Fisk: Q. Now, after Schenley turned over its check to the bank and received the original warehouse receipt, what did it do with the warehouse receipt in the West Coast transaction?

A. The warehouse receipt itself was turned over to the Production Department representatives, who controlled the bulk whisky inventories—bulk whisky inventories of the West Coast.

Q. Bulk whisky inventories of the West Coast?

A. That's right.

Q. And who would be the head of that department during the period from the last half of 1948?

A. It would be under Mr. Baglin or Mr. Donnelly, who was Mr. Baglin's superior.

Q. Under his immediate supervision?

A. Yes.

(Testimony of Earl Johnson.)

Q. Now, would the warehouse receipt received be negotiable [621] or not negotiable?

A. It might be either. In the West Coast offices, however, we only maintained the non-negotiable warehouse receipts. The only things we retained out here were our files.

Q. If it were a negotiable warehouse receipt, what would be done with it?

A. It might be held in here temporarily, but there would be notification immediately given to the New York Cashier's Department; and ultimately, if the negotiable warehouse receipt were retained by the Company, it was not resold, it would be held in the New York Cashier's Department.

Q. Now, was there any other transaction of the character you have testified to, in your method, too, than those between Hedgeside and Schenley in California? A. Yes.

Q. Where?

A. Well, we have storage in a number of warehouses out here, which are under outside, or owned by outside warehousemen. There would be warehouse receipts in support of those. There has been production out here between Schenley and American Distilling Company, over in Sausalito, I believe it is, where we have that type of transaction.

Q. Is there any other distillery of the character of Hedgeside in the State of California than the American that you referred to at Sausalito?

Mr. La Shelle: Just a moment, Your Honor. I'll submit this isn't a proper voir dire cross ex-

(Testimony of Earl Johnson.)

amination, or any cross [622] examination. He has not testified what distilleries are located in California.

Mr. Fisk: Your Honor, he has testified to a method or practice followed in California, and obviously he has testified to it as a general practice. If there was only one customer of the character he is talking about, it could hardly be designated as a general practice.

The Referee: Q. Well, Mr. Johnson, you tell me, other than Hedgeside and merely as far as Schenley's are concerned—never mind what other distilleries are on the West Coast—what other besides Hedgeside Distillery that Schenley's carry on the same type of transaction? You mentioned the American Distillery.

A. In this particular type of transaction, the only one I recall is with American Distilling Company.

Q. That is as far as Schenley is concerned?

A. That's right.

Q. Regardless of how many distilleries there are on the West Coast. I am not expecting you to answer that.

A. That's right.

Mr. Walsh: Your Honor, please, I think maybe, in all fairness to the record, one question was asked in California. Your question was as to the West Coast. And does the witness understand the question was the West Coast?

The Referee: In answer to Mr. Walsh's request for clarification, you may clarify that; if there is

(Testimony of Earl Johnson.)

something [623] other than California, you may clarify that. You have American Distilling Company in California. Now, let's say the West Coast.

A. As far as the particular type of spirits produced, I believe the American Distilling Company is the only other one.

Q. Would that take in Washington and Oregon—I mean, as far as Schenley's transactions on this particular type of a transaction that was entered into with Hedgeside, where you have stated that you think that in the American Distilling Company the same type of transaction—now, at the time we were talking about California and the West Coast, so there will be no misunderstanding, would your answer be the same if we included Oregon and Nevada and Arizona? A. Yes.

Q. You referred to the original written contract as between the producer and Schenley as one of the prime documents, in fact, the first prime document, and I believe you said that in both the West Coast and the East Coast transactions the original of that document was forwarded to New York and kept in New York? A. Yes.

Q. And in certain instances, in the number 2 transaction, you received a facsimile copy?

A. That's right.

Q. On the West Coast. In the number 2 transaction, did the contract provide for the form of the warehouse receipt that you were to receive on that type of transaction? [624]

A. Not that I recall, no.

(Testimony of Earl Johnson.)

Q. Did it, or does it, according to general practice that you have encountered during this period in question, make any reference whatsoever to the type of warehouse receipt you shall obtain in order to give approval and payment on a transaction?

Mr. La Shelle: You are talking generally, not this particular contract.

Mr. Fisk: That's right.

A. As to form, no.

Mr. Fisk: Q. Does it, in any manner, refer to the warehouse receipt?

A. I would have to refer back to the contract, in order to get an answer to that.

Q. Well, when you testified as to your number 2 practice, that is, sales under contracts, you had in mind a general form of contract that was used, did you not? They had certain similarity, did they not, these contracts you had in mind?

A. Certain similarity as to being a basic contract, but they were widely divergent.

Q. Well, in each one of these contracts, wasn't there certain basic provisions appearing in each one of these contracts? A. Yes.

Q. And wasn't there a basic provision in each one of the contracts with reference to the warehousing and the method [625] of receiving?

A. Yes, generally. I couldn't answer that on a specific basis, though, without referring to each contract. Generally, yes.

Q. Well, what did it provide for generally as you best recall?

(Testimony of Earl Johnson.)

A. It provided for the production of a certain type of products by the vendor if it were a production contract, or the sale of certain types of products or items by the vendor in case of a sales contract.

Q. Did it provide whether goods sold under the contract were to be warehoused?

A. No, in a case of bulk spirits which are carried in bond, it might or might not specify the warehouse. It would always specify if it were in bond, it would have to be in an I.R.B.W.

Q. Well, take the West Coast transaction, who would determine whether or not the warehouse receipt offered by the bank conformed to the requirements of the contract?

A. It would be a combination. The Cashier's Department, at the time the transactions on the contract were going through, the Cashier's Department would be the determining point that the provisions in the contract fully protected Schenley's interests. That's subject to review by the heads of our Production Department, by the Internal Audit Department, by various others.

Q. All before payment was made on the sight draft, is that right? A. No, no.

Q. Well, what did you do—the person that you sent over from [626] the West Coast office, to examine the papers at the bank, what did he do and what did he look for with respect to the warehouse receipt to tell whether or not there had been conformity under the contract?

(Testimony of Earl Johnson.)

A. As far as the warehouse receipt was concerned, it had to cover the particular spirits or merchandise which was being paid for on the vendor's invoice.

Q. And that was all? A. That was all.

Q. Nothing else? A. Nothing else.

Q. As long as it was being purchased in bulk, that is, in barrels or drums, if it specified that it was spirits grain and so many barrels and the serial numbers, that's all you required?

A. That had to correspond to what was shown on the invoice.

Q. I see. A. That's right.

Q. Each of those features corresponded to the invoice, and it, of course, included Schenley's name on it? A. That's right.

Q. And the name of the warehouseman on it. That was enough, is that right?

A. That's right.

Q. Could it be held negotiable or non-negotiable, within the discretion of the vendor?

A. No, generally it was within the discretion of the [627] contracting parties and so shown on the invoice or in the contract.

Q. Now, you also referred to copies of invoices. Did the bank have copies of invoices, or did it have the original and one or more copies, or only the original?

A. It would have an original and one or more copies.

Q. The bank would?

(Testimony of Earl Johnson.)

A. The bank would, right.

Q. And that would be the invoice of the vendor, who was one of the contracting parties, is that right?

A. That's right.

Q. Now, what did your contract require in substance, appear on the invoice? I am talking about the basic things now. I recognize there could be some deviation.

A. Are you referring, Mr. Fisk, to the particular contracts which we are working on now?

Q. No, no.

A. In general.

Q. You have testified, under your so-called second method, to a general practice followed by the West Coast. Now, I am having in mind your testimony as to the general practice, and you must have had in mind, in order to give such a method, some general form of contract employed on the West Coast. Now, I am thinking of that form of contract. What did the substance usually require be stated in the invoice?

A. Well, in general, the type of merchandise which was purchased by Schenley, the quantity which might vary very widely, [628] as between bulk whisky or grain purchases; in proof gallons generally the price which was to be paid, either on a tentative or a final basis, according to the terms of the contract, and changes with respect to review of those prices on the basis of audit. I mean, in other words, in some instances contracts provide that a tentative payment be made, subject to change,

(Testimony of Earl Johnson.)

on the basis of subsequent audit. That's about the general qualifications in all contracts.

Q. It had to be addressed to Schenley, of course? A. Yes.

Q. And it was dated? A. Dated, yes.

Q. And it was numbered?

A. Usually, not necessarily, I mean. That's generally accepted as one of the requirements of business practice, who it is addressed to, and that it's dated. That they're numbered, and so forth, is not required.

Q. Was it required that it be signed?

A. Not always.

Q. Well, was it ever required that it be signed?

Mr. La Shelle: What do you mean, by "it"?

Mr. Fisk: He said "if required".

Mr. La Shelle: No, I mean, what do you mean by "it"?

Mr. Fisk: The invoice, I am talking about.

A. No, that's not generally required.

Mr. Fisk: Q. Was it required that the invoice [629] designate the warehouse where the goods covered by the invoice had to be stored?

A. It's possible it might. In other cases, it might not.

Q. What was the usual practice?

A. Generally, that would be up to the vendor's discretion, if it were an acceptable point by Schenley.

Q. I see. Did you require that the original invoice in the hands of the bank have the written approval of one of your representatives signed on it?

(Testimony of Earl Johnson.)

A. That was not required—it is not generally required, but it may be.

Q. I am speaking in general.

A. In general, no.

Q. In general, no; but sometimes yes?

A. Sometimes yes.

Q. Did you require that there be a sight draft?

A. In some of the contracts, that's stipulated; in other contracts, it's not required. That's generally determined at the time of the preparation of the contract between the parties involved.

Q. I am speaking now of the transaction that is handled through the bank?

A. No, it would not have to be. An account could be assigned to the bank for collection purposes, which would not be stipulated in the contract.

Q. In other words, there were instances where the vendor would sell production to Schenley under a written contract with Schenley and assigned the right to receive payment to the bank?

A. Yes.

Q. In which case, how would he notify the Schenley Distillers of the fact of the assignment?

A. Well, it could be in a number of ways. It could be by written advice, it could be by the terms of the contract, it could be by an amendment of the contract, it could be by telephone advice, it could be by contact by telephone advice and affirmation by the bank that such would be the procedure, and sometimes it's stipulated on the—I say, in instances,

(Testimony of Earl Johnson.)

not with any particular reference to what we have done, that I can recall, where the bank has a right of assignment and all invoices are stamped to the effect that all payments to be made by the Company or to that particular vendor are to be paid to the bank.

Q. Did Schenley ever make the practice of taking up papers at the bank and pay to the bank with sight draft, merely on a telephonic advice of an assignment to the bank?

A. No. Not without clearance by both the bank and the other party. I say, that there is a wide divergence of practice in transactions of that nature, which are all accepted.

Q. In the instance where you had a sight draft transaction at the bank and there was the original invoice and one copy there, did you ever make the practice of having the vendor [631] furnish you with an additional copy of the invoice, outside of the copy turned over to the bank?

A. Yes, yes.

Q. And what did you do in that instance?

A. There are other departments besides the Disbursing Department in Schenley's who are vitally interested, particularly in the case of bulk spirits. Schenley projects their production probably six to eight months in advance of actual bottling. In the case of spirits present, for instance, they establish at the time what they are going to produce, we will say, for the forthcoming months. They have to know that those spirits are available and on hand.

(Testimony of Earl Johnson.)

They may be requiring the—in short, they schedule what their production requirements are going to be for the forthcoming months, so a copy of an invoice would be very valuable to our department to know what spirits are going to be available for their production purposes.

Another purpose for which such a copy might be used is to give the Accounts Payable Department advance notice of how much funds are going to be required to be on hand in their disbursing bank account to meet the payments which are going to be called upon for the next few days; or sometimes our disbursements of the West Coast might run as high as a million dollars a day. We would have to know in advance some basis on which we could obtain funds and hold them in our bank to meet those requirements. [632]

Q. But you did not require at any time, where you were purchasing on sight draft, that the invoice be signed by the vendor, did you?

A. I wouldn't say in any case. In some instances—

Q. Your usual practice?

A. Usual practice, no.

Q. It would be the exception?

A. It would be the exception.

Q. To receive it that way, is that true?

A. That's right.

Q. Well, we will take the case where you are notified by the banks that a sight draft is in the bank, together with a warehouse receipt and invoice,

(Testimony of Earl Johnson.)

and you send your Inspector over there, to go over with a check and turn it over to the bank and receive the warehouse receipt and invoice. To whom do you make a check payable?

A. That, again, could be stipulated in a contract——

Q. Now, bearing in mind that I have asked you as to the transaction where you have a sight draft, to whom do you make your check payable?

A. On a sight draft it would be made payable to the bank.

Q. It would be made payable to the bank designated in the sight draft. A. That's right.

Q. Would it make any difference as to who drew the sight draft as to how you make the check payable?

A. Yes, generally it would. [633]

Q. Well, will you explain that answer? Do you mean that, if you had, for instance, the X-Y-Z vendor drawing a sight draft on the A-B-C bank that it would make a difference as to whether you drew your check to the A-B-C bank, as to whether or not it was X-Y-Z who drew the draft, or P-D-Q; is that what you mean? A. Oh, yes, yes.

Q. In what way would you change the form of your check, depending on who made out the draft?

A. The form of the check itself would not change, but there would be a check-back as to the reason why somebody was drawing the sight draft for somebody else. There might be dual interests. In some instances we find an assigned account, which

(Testimony of Earl Johnson.)

is another, I believe, accepted business practice, an assigned account. An account may be assigned by a company to a collection agency, in which case the collection agency might be drawing the sight draft, in order for us to recover the property.

Q. In other words, before you would pay the money to the bank on a sight draft, you would want to know who drew the draft, is that right?

A. We would want to know who was finally going to receive that money. I mean, is it going to clear our account with the producer or the seller?

Q. In other words, you weren't just satisfied with receiving the goods for your money? [634]

A. Not necessarily, no.

Q. You wanted to know who was going to get the money, is that right?

A. That's right.

Q. In all instances? A. Yes.

Q. And then, what determination did you then make, after paying a sight draft, to see who got the money?

A. That determination would generally be made before, not afterward. We would have a clearance of an account. Certainly, if we didn't pay and we received merchandise under an account and we had paid for that merchandise or we didn't pay it until we had the documents in support of receipt of that merchandise, if the payment didn't ultimately arrive in the hands of the vendor and we would know it's there. But before that, we would have to have some acknowledgment, some knowledge, some

(Testimony of Earl Johnson.)

way of knowing that that particular vendor was receiving payments, either directly or through assignments or through the bank channels.

Q. But weren't you getting your goods for your money? What did you care where the money went?

Mr. La Shelle: We submit, Your Honor, that is not proper cross examination, as to what they cared.

Mr. Fisk: I am examining him on continuity, Your Honor.

The Referee: Overruled. You may answer.

A. Yes, certainly, I could get, if we cited it into a personal [635] case, certainly, if I could obtain goods from one person where it wasn't his property, if I paid him and didn't obtain a release somehow or other, in some form from the party who actually owned that. I mean, I would have to know that I would have to protect my interests.

Q. In other words, on these sight draft transactions, you wanted to be certain, before you turned over your money to the bank, who was going to get the money, because you were looking to your transaction with that person, rather than the fact that you received property for money, isn't that true?

A. Well, it's a combination of both. Transactions are dual. We are certainly going to receive property for our money when we make a payment. We also know that, somehow or other, that the payment is going to the person who had the right to that property before.

(Testimony of Earl Johnson.)

Q. Well, the bank has the right to the money, do they not? A. On the sight draft, yes.

Q. Then, why would your responsibility extend beyond paying the money to the bank, in your opinion?

A. (There was no answer.)

Q. I am not asking you that question, Mr. Johnson, as a matter of law or academic curiosity. I am just asking you from a standpoint of your knowledge of Schenley's practice on the West Coast.

A. Of course, we would assume that a large amount of the responsibility on the payment of moneys into a bank would [636] be the fact that the bank would have title or had the right to pass that title to the property. However—

Q. You went further than that.

A. We would go further than that, yes.

Q. Now, what became of the sight draft after you paid it? I am talking about the West Coast now.

A. On the West Coast, the sight drafts are held—they are usually held as one of the supporting documents in payment. However, at the time—

Q. You have previously listed, though, for us today as one of the supporting documents?

A. No.

Q. But you say now that it is, according to West Coast practice on a number 2 method or transaction, where sight drafts are employed, it is one of the supporting documents that's kept, is that right?

A. That's right.

(Testimony of Earl Johnson.)

Q. Now, where is it kept on the West Coast transaction?

A. At the time of the contracts with Hedgeside, the October 13 contract with Hedgeside, we had a department in our San Francisco office, termed the Cashier's Department, through which all payments to creditors were made. Our procedure at that time was such that when these payments were made on these sight drafts, the copy of the sight drafts was retained in the files of the Cashier Department in the normal course of business. About a year and a half ago, that department, as far as the whisky operations, were discontinued. [637] The files of the Department were turned over in part to our Production Department, under which our Accounts Payable Department or Section now operates; part of their files were put into our dead storage, and possibly part of them were destroyed. I know that in the instances of the sight drafts concerned, these particular contracts with which we are concerned, I have checked through all the logical points on the West Coast in the office, but I have been unable to find them.

Mr. La Shelle: Your Honor, it's five after four, and anticipating the usual recess time, I have an appointment over in the city. I am supposed to be there as soon after 4:30 as I can, so I think I will have to go, because we usually recess at this time.

The Referee: Very well, gentlemen.

(Thereupon an adjournment was taken.)

January 11, 1950—11:00 a.m.

(Same appearances.)

The Referee: All right, Mr. La Shelle, whenever you are ready. Mr. Fisk was in cross examination.

Mr. Walsh: For the record, your Honor, I understand this is a voir dire cross examination.

Mr. Fisk: That is right. Just one of the methods he has testified to.

The Referee: And also subject to the stipulation, with reference to Mr. La Shelle objecting to the right of the bank to go into these.

Mr. La Shelle: I think the record is pretty clear on that, your Honor.

EARL JOHNSON

previously sworn, resumed the witness chair and testified further as follows:

Further Voir Dire Examination

Mr. Fisk: Q. Mr. Johnson, at the last hearing—at the close of the last hearing, you were testifying with respect to methods employed by the West Coast office, and by the New York office, where you had a contract and where you bought on a sight draft. Now, in Petitioner's Exhibit 31 for Identification, in one of those groups of papers attached [639] to warehouse receipt 3386-B, you have attached what purports to be a letter of Schenley Distillers Corporation to Hedgeside Distillery Corporation, Post Office Box 269, Napa, dated March 31, '47, from the Accounts Payable Department of

(Testimony of Earl Johnson.)

Schenley Distillers; and suppose you look at that letter and tell me what it purports to be.

Mr. La Shelle: Your Honor, I object to that question on the ground it's not voir dire examination.

Mr. Fisk: Yes, it is, it's preliminary to that.

The Referee: Wait a minute.

Mr. Fisk: Excuse me.

Mr. La Shelle: I have not been permitted to ask any questions about these Exhibits as yet of this witness. Leave was asked for a voir dire cross, as to his qualifications.

Mr. Fisk: I'll withdraw it, to save time. I'll withdraw it.

Mr. La Shelle: It's proper cross at a later time, but not now.

Mr. Fisk: Q. With respect to these methods employed, you testified that, in addition to the time Schenley paid its check, in addition to obtaining the warehouse receipt from the bank, they saw to it that the money went to the proper person. Now, did the New York office have a practice of addressing a letter to the person to whom the money paid on the sight draft was to go?

A. Not necessarily, Mr. Fisk. [640]

Q. Well, not necessarily. Did they make a practice of doing it at all?

A. No, within the operations of the Accounts Payable Department, or any other department, the heads of those departments have a wide discretion on the handling of any given transaction, on just

(Testimony of Earl Johnson.)

how they clarify anything which may be used as a supporting document or as an aid to the clearance of those bills.

Q. Well, is it your testimony, then, that the New York office did not make a practice of addressing a letter to the person to whom they intended the money to go, on the payment of a sight draft?

A. They could, but it wouldn't be necessary.

Q. Well, is it your statement that they did not have such a practice?

A. In the normal course of business, no.

Q. Well, then, you would say it would be a rather exception that such a thing would be done in the normal course of business, is that right?

A. Not necessarily, no. I would say that it would be up to whoever was handling the particular transaction in which they were dealing to decide whether a letter would be used or other forms of advice.

Q. Well, regardless of whom it would be up to, was it a frequent occasion under their practice that such a thing was done? [641]

A. I couldn't say how frequent. I'd say that it has been done and it could be done, but it would be up to the particular person handling that transaction to say whether he wanted to use that form or——

Q. On the average, in New York, was it done 50 per cent of the time, or 1 per cent of the time, or 99 per cent of the time, or what is your estimate? You're familiar with the practice of New York, are you not?

(Testimony of Earl Johnson.)

Mr. La Shelle: I object to that; just a minute, your Honor. That's a complex question, containing two separate and distinct questions.

Mr. Fisk: Strike out the last portion of it.

The Referee: Read the question with the last part stricken.

(The reporter read as follows):

“Q. On the average, in New York, was it done 50 per cent of the time, or 1 per cent of the time, or 99 per cent of the time, or what is your estimate?”

The Witness: I don't believe I can give an estimate on that.

Mr. Fisk: Q. You have no idea? A. No.

Q. Now, what about the West Coast?

A. I would say the same answer would apply.

Q. The same answer is that you have no idea?

A. No.

Q. How often it was done? A. No. [642]

Q. Was it ever done on the West Coast?

A. Well, in many transactions there's correspondence in connection with clarification of terms, and so forth.

Q. Well, did the Schenley Company have a form letter for giving such a notice in their files?

A. No, not as a form letter, no.

Q. They did not have such a form letter?

A. No.

Q. Either in New York or in San Francisco?

A. Not as a regular-to-use form letter. They may have an improvised, and somebody within a particu-

(Testimony of Earl Johnson.)

lar department might have set up what they considered to be a form letter for that purpose and use it on occasion, but not as a standard requirement.

Q. Well, now, Mr. Johnson, how was — strike that out. Who determined what would be the standard requirements of the practice of the Company?

A. The person or persons who had been handling the particular series of transactions within the Accounts Payable Department, or the Cashier's Department.

Q. All right, let's take the period from—during the years '47 and '48, who determined that in New York.

Mr. La Shelle: I don't quite understand that question, "who determined that?" I can't pin down that.

Mr. Fisk: Well, determined the standards of practice.

The Referee: The standards of practice.

A. The standard of practice within an accounting department [643] are determined by the person who is heading up that accounting department, and it's at his discretion of the support he needs, outside of the types of support which I have given, which are required in connection with any particular transaction.

Mr. Fisk: I ask that the answer go out as not responsive, and that the reporter read the question back to him.

Mr. La Shelle: I submit it is.

The Referee: Read the answer, and the question.

(Testimony of Earl Johnson.)

(The last question and answer were read by the reporter.)

The Referee: It may go out.

Mr. Fisk: Q. Do you understand the question, Mr. Johnson? Who determined, during the years '47 and '48, what the standards of practice of New York would be with respect to these matters we are talking about?

A. Within the Accounts Payable Department, where most of these transactions or most of the supporting documents had been obtained, the head of the Accounts Payable Department.

Q. And who was that during those years?

A. Mr. Laubenheimer.

Q. During the period '47 and '48 it was Mr. Laubenheimer?

A. As far as I can recall that now, yes.

Mr. Walsh: Will you spell that name, Mr. Johnson?

The Witness: L-a-u-b-e-n-h-e-i-m-e-r; that was in New York.

Mr. Fisk: Q. And how did Mr. Laubenheimer, during [644] those periods, record his determination as to what would be the standard of practice?

Mr. La Shelle: Your Honor, I submit that that's not proper voir dire cross examination to ask this witness what a man did and why he did it. I submit that is not proper voir dire or any cross examination.

The Referee: Well, Mr. La Shelle, the witness has testified that he was familiar with the practice in

(Testimony of Earl Johnson.)

New York, and was familiar with the practice on the West Coast. Mr. Fisk is testing his knowledge on that subject.

Mr. La Shelle: Well, I submit.

The Referee: Read the last question that Mr. Fisk asked.

(The last question was read by the reporter.)

The Referee: If there is an objection, it is overruled. You may answer.

A. In order to answer that, I have to refer back to previous testimony which I have given in connection with any particular transaction.

Mr. La Shelle: Also assumes something that he did record it. There is no evidence that he did record that. It assumes something not yet testified to about it, is the vice of that question.

The Referee: Did he record, written or in any other manner?

A. No; a requirement of that nature would not be required to [645] be written. It would be up to the discretion of the head of the particular department.

Mr. Fisk: Q. Then, is it your testimony that, as to the standards of practice of the Accounts Payable Department during the years '47 and '48, it was entirely within the discretion of Mr. Laubenheimer, is that correct? A. No.

Q. Without any recording as to what the practice was? A. No. I said——

Q. What is your testimony?

A. My testimony was that in support of certain

(Testimony of Earl Johnson.)

types of transactions, there were certain required supporting documents. Those are standard. That's required under all accounting procedure, whether it's Schenley or otherwise.

In addition to that, the head of any particular department, may or may not decide that he wants to write, that he may telephone, he may go into conference, he may want any additional information, and it's up to his discretion, and what he might determine as additional to support the payment of a bill.

Q. Well, now, do I understand your testimony to be this, Mr. Johnson: that in New York, during the years '47 and '48, there were certain recorded standards of practice in transactions of this kind, is that right?

A. Not recorded standards of practice, but standards of practice which are determined on the basis of accounting [646] requirements.

Q. You mean general accounting requirements as occur all over the country, is that right?

A. Yes.

Q. They have no particular standards of practice whatsoever, is that right, that were recorded in any written document on file with the Company?

A. We do have standards of practice which originate out of the New York office, and which are controlled there, but they merely supplement or expand on information or on requirements which are established because of regular accounting requirements.

(Testimony of Earl Johnson.)

Q. How are those standards recorded with the Company?

A. They're recorded in Standard Practice Manuals.

Q. And are those Standard Practice Manuals available here on the West Coast?

A. Yes, copies of them are.

Q. And do you have any in your possession?

A. I do.

Q. Is the same thing true with respect to the practice in San Francisco?

A. Yes.

Q. And you have in your possession such a manual in respect to San Francisco practice, is that right?

A. I might—yes, the answer is yes, but I'd like to explain that. Most of the practices followed in the West Coast Division, as I have already testified, in the Whisky [647] Division, are controlled by the New York office, and a manual of that nature, if it needs revision out here to fit the needs of an operation, the New York Manual is supplemented to fit—I mean, we do not have the volume of help out here that we have in New York, so we have to fit the program according to our needs, so we follow, generally speaking, the New York Standard Practice Manuals.

Q. Is it your testimony, then, that New York has a manual of standard practice, and that the West Coast follows that manual, except that it has a manual which supplements the New York manual

(Testimony of Earl Johnson.)

to fit the particular needs of the West Coast; is that right?

A. There wouldn't necessarily be a separate manual. The New York manual might be supplemented with correspondence or supplementary information pertaining to the particular manual from the New York office. It wouldn't necessarily be a separate manual.

Q. May the New York manual be varied by the West Coast practice?

A. Oh, yes, yes, within the discretion of the department heads operating.

Q. In other words, the West Coast practice is that the individual department head may, within his discretion, vary any standard of practice of the New York manual; is that right?

A. If he has a reasonable foundation for making such variation, yes. [648]

Q. Would the West Coast make a practice, during the years '47 and '48, of notifying in writing the person or corporation or partner, to whom they expected a payment on a sight draft to go?

A. No.

Q. They did not? A. No.

Q. At any time during that period?

A. No.

Q. Did New York do it at any time during that period, in the discretion of the head of the department involved?

A. Some correspondence I have seen in the particular Exhibits, I believe they did on occasion.

(Testimony of Earl Johnson.)

Q. But you have no personal familiarity with the practice of New York in that regard, is that right?

A. It's not—that practice, again, is not a requirement on the part of either New York office—

Mr. Fisk: I ask the answer go out.

The Referee: So ordered.

Mr. Fisk: Q. Do you understand the question?

A. I'd like to have it read again.

(The last question was read by the reporter.)

A. Not in that regard, no.

Q. Are there any other discretionary practices that the New York office may have employed that you have no familiarity with?

Mr. La Shelle: Just a moment, your Honor, we submit that this is not proper voir dire examination.

The Referee: Mr. La Shelle, pardon my interruption, [649] but the witness testified that he was familiar with the practice, as carried on in New York.

Mr. La Shelle: He said he was familiar with the practice of all documents and essential documents to preserve in support of a transaction. We are not attempting to put those in under the Business Records Act. And I don't think that Counsel is familiar with what is in point here. We are not trying to introduce in Evidence any Schenley procedures. We say there are certain things that are essential supporting documents, such as a cancelled check and the invoice, and so forth. Those are essential sup-

(Testimony of Earl Johnson.)

porting documents, to be kept in the regular course of business. When we went to assemble this evidence, Mr. Johnson went where those should be under Established Procedures, and they were there, and here they are.

Now, if I may have that for a moment, I can explain what I mean, your Honor. Under the United States Code, under Procedure, Section 1732, and this refers to this Court as well as other Courts, here it says:

“In any court of the United States and in any court established by the Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event shall be admissible as evidence of said act, transaction, or occurrence, [650] or event or within a reasonable time thereafter. All other circumstances of the making of such a writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term ‘business’ shall include business, profession, occupation and calling of every kind.”

Now, we have here, which we are looking toward introducing in Evidence, just to take the first one as a matter of illustration to the Court, using the originals instead of the photostats, here is a cancelled check of Schenley, here is the cancelled draft of Franciscan, here is the original invoice of Franciscan, and Accounting Distribution, which is some

(Testimony of Earl Johnson.)

internal record that they keep; these are all original documents, standing of and by themselves. They practically speak for themselves.

Now, all this man is saying is that he knows when a transaction of that kind is done, certain supporting documents should be preserved under standard accounting procedures that would apply to any company. When he went to look for them, he looked to where they ought to be, and he got them. Now, whether or not somebody might regard [651] a letter about it in his discretion, or this and that, and just what that man did do under a given circumstance, has nothing to do with the qualification of these documents.

The Referee: First of all, as far as the Code Section is concerned, the Code Section says, documents kept in the regular course of business.

Now, that's what started all this controversy. Now, who is going to determine what documents are kept in the regular course of business?

Mr. La Shelle: He has already testified to that.

The Referee: And Mr. Fisk is cross examining him on the subject.

Mr. La Shelle: No, he is cross examining him as to whether the head of some department might, at his discretion, write certain letters in connection with those documents.

The Referee: Well, it's entirely possible that Mr. Fisk might be aiming at maybe in the regular course of business there was kept other documents that are not included in these, or maybe there are some

(Testimony of Earl Johnson.)

documents in some of these Exhibits that are surplusage; I don't know.

Mr. La Shelle: Well, I submit, your Honor, that these documents here, which I have mentioned, the cancelled drafts, the cancelled check, the original invoice, that that is sufficient to establish that transaction. Now, if somebody [652] wrote a letter about it and questioned something, this and that, that doesn't add anything to the picture. Why we paid it? Why did you do this? The fact is, the draft came through from Franciscan; it was honored, it was paid; that showed in the cancelled draft that went through the regular banks, our cancelled check paid the bank, we got the invoice, matches up and ties in by serial numbers to the warehouse receipts. Now, did you want to make sure that that reached them? Now, are you sure that the bank paid them? Some fellow might be suspicious of the bank, but it's not going to change that transaction.

The Referee: Are each one of these sets that make up the Exhibit for Identification identical?

Mr. Fisk: If that's not a form letter, I don't know what one is.

Mr. La Shelle: But does that add anything to the transaction?

The Referee: Well, then why offer it?

Mr. La Shelle: Well, none of this has been offered yet.

Mr. Fisk: It's before the Court for Identification.

Mr. La Shelle: This is a voir dire cross examina-

(Testimony of Earl Johnson.)

tion. Now, if some of these letters, probably quite a few letters here that are self-serving, probably wouldn't be admissible on that basis. Now, the fact that on some occasions they might have sent a letter, and on other occasions they did not, how does that change the fact that a draft was honored, [653] it was paid, and an invoice was given, and a warehouse receipt? It neither adds nor detracts to the transaction.

Mr. Fisk: That's what I am trying to find out, and you don't want us to do it.

Mr. La Shelle: No, I say it's utterly incompetent on a voir dire or any other cross examination. It amounts to this: that you presumed that a man did an act. In other words, Schenley honors that draft, your Honor, and they got this invoice and they got the warehouse receipt. That ties into it. Now, Schenley might have written fifty letters, but it wouldn't change that transaction.

The Referee: I don't know that.

Mr. La Shelle: Well, I mean, as a matter of law it wouldn't.

The Referee: I can't prejudge the matter, Mr. La Shelle. Mr. Fisk—

Mr. Fisk: What law establishes that, Mr. La Shelle? Am I deciding the law?

Mr. La Shelle: Plain, common sense.

Mr. Fisk: You are talking about the law of common sense, now.

Mr. La Shelle: No, here is a draft which has been honored and paid. Now, it has been honored and

(Testimony of Earl Johnson.)

paid. Why it was, what comments were made about it, are all immaterial. The fact was that it was honored and paid.

Mr. Fisk: We don't know whether it was or not. [654]

Mr. La Shelle: Well, if these documents don't establish it, what would?

Mr. Fisk: Well, maybe you could prove it; I don't know.

Mr. La Shelle: I say that that proves it.

Mr. Walsh: Your Honor, please, how can the Court or opposing Counsel determine without proper cross examination, whether certain documents have been probably omitted from the files that are in Court?

The Referee: Or added to.

Mr. Walsh: Or added to, yes.

The Referee: Mr. Fisk, you may continue.

Mr. La Shelle: Nothing has been omitted. We got what was there.

The Referee: Well, Mr. La Shelle, opposing Counsel and the Court don't know that. I mean, your statement is that you got what was there, while Mr. Fisk and Mr. Walsh want to be certain that you got all that was there.

Mr. La Shelle: We don't propose——

The Referee: Or that they didn't get something extra.

Mr. La Shelle: There are various things that must be gone over. For example, we haven't offered any of this yet. We haven't even been able to ask

(Testimony of Earl Johnson.)

our witness one single question pertaining to this. There are lots of things—for example——

Mr. Walsh: Well, why argue, discussing it now, then? [655]

Mr. La Shelle: We are not going to offer any letters in Evidence on the thing, and they don't mean anything; they're incompetent.

Mr. Fisk: If the Court please, Counsel a moment ago objected to my referring of those documents and I withdrew my question. I am not referring to the documents on that account, and I don't know why Counsel should refer to them. This witness has testified at a previous hearing that he had personal knowledge as to the practices of the New York office in transactions of this kind and the West Coast office, and he testified what the practice was, and he went far beyond any entries in the book and records of Schenley, and I submit that I am entitled to test him as to his knowledge and as to whether or not there were other transactions that he testified to, which had to do with the method he has testified upon. It has nothing to do, or rather, it isn't confined to any documents at all. We are not talking about documents now. It so happens that Counsel—why, I don't know—maybe he made a mistake before the Court by offering for Identification certain letters—form letters of notification evidently employed by the New York office, because there are a great many of them, and now he evidently feels that was an unwise move, and he wants to——

Mr. La Shelle: Mr. Fisk would be the first to

(Testimony of Earl Johnson.)

object that I did nothing. In other words, Mr. Fisk is entitled to any reasonable cross examination, but when he [656] goes into something that would be incompetent and subject to his opposition if I even try to get it in, supposing one fellow might have written ten letters about something, how does it change the picture? It's not competent evidence.

The Referee: He is still cross examining him on Mr. Johnson's knowledge of the practices used in New York.

You may proceed, Mr. Fisk.

Mr. Fisk: Will you read the last question, Miss Reporter?

(The last question was read by the reporter.)

A. Numerous ones.

Q. Numerous? A. Yes.

Q. Now, do you have the New York manual with you here this morning? A. No.

Q. You are in a position to produce it, are you not? A. Yes.

Q. And do you have the warehouse supplementary manual? A. Yes.

Q. And you are in a position to produce that?

A. Yes.

Mr. Fisk: I am going to ask the Court to direct the witness to produce those at the next hearing, your Honor, please. I would like to have an opportunity to examine those manuals, because it seems to me that the witness's testimony is that the New York practice as to certain basic elements is controlled by the New York manual, that it may [667]

(Testimony of Earl Johnson.)

be supplemented on the West Coast by a West Coast manual, and that either of them may be valid in any respect by the discretion or at the discretion of the individual head of the department at the time, which seems to me nullifies his entire statement as to what is the practice.

It had no practice which could be placed before this Court by general testimony, by a witness of this character, because there was none on his own testimony. It could be valid at any time by the particular head for any reason, even as to the basic elements. That's his testimony.

Mr. La Shelle: Now, your Honor——

Mr. Fisk: I submit that his testimony should go out. I move to strike it on that account.

Mr. La Shelle: Are you all through, Mr. Fisk?

Mr. Fisk: No, I am going to be here for several more weeks.

Mr. La Shelle: Months, I'll say.

(Laughter.)

Mr. Walsh: Who started it?

Mr. La Shelle: I mean, are you through with this particular argument?

Mr. Fisk: No, sir, not if you're going to keep on arguing.

Mr. La Shelle: Are you going to continue, so that I won't interrupt you?

Mr. Fisk: I finished my last statement. [668]

Mr. La Shelle: I see. So you're all through.

Mr. Fisk: I finished my last statement.

Mr. La Shelle: If it please the Court, we object

(Testimony of Earl Johnson.)

to that on the ground it's incompetent, irrelevant, and immaterial. And I also object to the summary of evidence Counsel just gave, as being in direct conflict with the record. This witness has stated that under standard accounting procedures, applicable to any large company, certain documents are always preserved in support of that transaction, and he named them, such as the invoice and the draft, and so forth. He then said that they had certain manuals. The New York manual can't fit exactly the West Coast. They don't have the help out here, and it's in the discretion of the individual executive or semi or minor executive to vary them in his discretion, provided he has a reasonable foundation for it. I think I am quoting his exact words, which is entirely different than Mr. Fisk stated.

Mr. Fisk: You are entirely wrong.

Mr. La Shelle: Just a moment. I can say this, for the benefit of Court and Counsel. These manuals are here. They're available, and if the Court instructs us to produce them, we will, of course, comply with the Court's order. They are long, they're varied. The witness has stated that the standard accounting procedure, which he knows as an accountant what to preserve—he knows that from his standard accounting practices. I don't think it's [669] competent or of any help in this case at all. This man has stated that he knows that certain documents are required. He said other documents may be kept in addition to them, but certain documents are required

(Testimony of Earl Johnson.)

under standard procedures. He went to get those documents where he knew they should be preserved, and they are.

Now, if we go into anything further in this, as a matter of saving time—have you got that case on that, Jack, I would like to cite to the Court? In other words, to go through that manual, just to get through the index to the thing, is quite a job, and it covers a thousand and one other things not in issue in this case. I am not afraid of anything in the manual; that is not the point.

The Referee: The Court is not going to instruct Mr. Johnson to bring the manual at this time, in any event.

Mr. Fisk, do you have anything further on the cross examination of this witness that's knowledge of the practices in New York and San Francisco?

Mr. Fisk: No, I have not at this time, but I would like to strike his testimony as to the methods on the grounds that if—strike that out. I have just one question I would like to ask.

The Referee: Very well.

Mr. Fisk: Q. Mr. Johnson, are you a C.P.A.?

A. Yes, sir.

Q. Are you a C.P.A., admitted to practice as a C.P.A. in [670] the State of California?

A. State of New York.

Q. But not in the State of California?

A. No, sir.

Mr. Fisk: Your Honor, I submit the witness is not entitled—he is not qualified as an expert to

(Testimony of Earl Johnson.)

testify as an expert on general accounting practices in the State of California.

The Referee: He is testifying as to Schenley practices.

Mr. Walsh: No, he testified also——

Mr. Fisk: Mr. La Shelle has stood up and said that these documents, or rather, the methods of practice here are a method of practice of general accounting practice, and that they are only supplemented by the various manuals and discretionary practices of Schenley. I submit he is not qualified as an expert to testify to general accounting practices.

The Witness: Might I make a statement?

Mr. La Shelle: Just a moment, please. If it please the Court, the fact that this witness is not a Certified Public Accountant in the State of California doesn't do away the fact of his education, which he has told us about, of accountancy and of what he knows. He could testify as to the standard procedure of accountancy, whether he's a C.P.A. or not. He studied it and he got it from his education and experience. [671]

Mr. Fisk: I submit that no foundation has been laid to qualify him as an expert.

Mr. La Shelle: I don't think that is any basis at all.

The Referee: His testimony may stay in. Overruled.

Mr. Fisk: Q. Is it your statement that it is general accounting practice, on the West Coast and

(Testimony of Earl Johnson.)

in New York and throughout the United States, for companies to keep all of the records that you have listed here in your statement at the last session were kept by Schenley in connection with a transaction of this kind for a period of three years?

A. Yes, generally. I mean, about——

Q. Not generally; I am speaking of your knowledge of general accounting practice throughout the United States. It is the practice of all companies to keep the list of records that you have enumerated here for a period of three years?

A. In the companies where I have worked, and the companies where I have reviewed the documents in support of such payments, yes.

Q. What companies have you worked with? You have worked with Schenley; now, who else have you worked with?

A. I have worked with——

Mr. La Shelle: I submit this is, again, going far afield. The witness has testified that he was a Certified Public Accountant with a company in New York. Obviously, he worked on many companies there. He stated that generally that is the practice, and he is asked for a general standpoint. [672] Now, you might find all kinds of things. As we were discussing the other day, some law firms keep their records a lot longer than others, but they all keep them a little while. To have this witness go in and draw on his memory at this date of all the various companies that he examined or reviewed or audited, or firms with Arthur Anderson Company, is going

(Testimony of Earl Johnson.)

far afield in a voir dire examination, Your Honor.

Mr. Fisk: I submit, Your Honor, the witness is not only not qualified to give the testimony that he has given, but that the testimony he has given is not true; it isn't correct. I think the Court can pretty nearly take judicial notice of the fact.

Mr. La Shelle: All right, Your Honor, if they think that they can put on any witness and show that this isn't correct, let them put him on; but there is a limit to a voir dire examination, Your Honor, and it's discretionary with this Court.

Mr. Fisk: I never heard of a man who puts on a man to testify as an expert to review, or rather, to object because we are cross examining him as to his qualifications.

Mr. La Shelle: I am saying, it is the Court's discretion to call a halt to this.

The Referee: The witness stated that, according to his knowledge it was the general practice.

The Witness: The general practice, yes. [673]

The Referee: It will not be necessary for him to answer the question, with reference to firms that he worked with or was associated with.

Mr. Fisk: That's all at this time.

Voir Dire Cross Examination

Mr. Walsh: Q. Just one question. Mr. Johnson——

Mr. La Shelle: Let the record show that you have the opportunity of Cross Examination at this time, Frank.

(Testimony of Earl Johnson.)

Mr. Walsh: This is not cross examination. This is merely voir dire. Don't let the record be confused.

The Referee: Off the record.

(Discussion off the record.)

Mr. Walsh: Q. Mr. Johnson, you have stated that you have had certain experience and training with Schenley in their Accounting Department.

A. Yes, I have.

Q. Now, having in mind that experience and training you have had, are you in a position to testify at the present time that you have knowledge of all of the transactions that are had in the New York office in their Accounting Department?

Mr. La Shelle: Just a moment; we will object to that question, Your Honor, as obviously calling for the witness's own views as to his qualifications. It is not proper voir dire or any cross examination—Do you think that you're an expert? That is what the question amounts to. [674]

The Referee: Will you read Mr. Walsh's question?

(The last question was read by the reporter.)

The Referee: That is of all of them, even the ones not connected with——

Mr. Walsh: No, I want to confine this solely to the ones that are connected with Hedgeside Distillery.

The Referee: Very well, you may answer, Mr. Johnson.

The Witness: I have to get my thinking the way

(Testimony of Earl Johnson.)

I saw the first question as it was stated, why, it has — have to change my thinking now in connection with the experiences——

The Referee: As to this transaction.

The Witness: As to this transaction.

The Referee: This series of transactions.

The Witness: Insofar as specifically required, supporting documents are concerned, yes.

Mr. Walsh: If Your Honor please, I ask that answer go out as not responsive.

The Referee: So ordered. Read the question again, please.

(The last question was read by the reporter.)

Mr. La Shelle: Will you read the answer?

(The last answer was read by the reporter.)

Mr. La Shelle: Well, Your Honor, I submit that is a perfectly good answer. It is the same as saying, “Yes, and I explain that by saying that insofar as the required [675] documents are concerned.” Obviously, he couldn’t know everything.

Mr. Walsh: Then, his answer is “No”.

The Referee: Then, he should say “No”, and if he wants to clarify his answer, he can.

Mr. La Shelle: It seems to me that the answer is all right. I move the answer be reinstated.

Mr. Walsh: You mean, you are asking the Court to set aside.

The Referee: It’s out. Mr. Johnson, you may answer Mr. Walsh’s question.

A. All right, then, the answer would be “No”, with an explanation.

(Testimony of Earl Johnson.)

The Referee: All right, let's have your explanation.

A. In various transactions, there may be more documents in the form of letters, coding documents, other information, which at the discretion of the department head are felt to be essential for his operation. Those, I would not have firsthand knowledge of. However, as far as the documents, which I have already testified to, which are required as standard documents in any particular transaction, I would have knowledge that those documents would be maintained in the New York office.

Mr. Walsh: Q. Now, Mr. Johnson, having in mind your answer just given, are you in a position to tell the Court that you are familiar with all of the documents which [676] are kept in each particular transaction had with Hedgeside Distillery Corporation?

Mr. La Shelle: Well, Your Honor, there again, I submit that is not proper cross examination. As to the required documents, yes. I can tell the Court and Counsel quite frankly, I have a stack of files this high of correspondence about this thing. It was one fight, from beginning to end, with Stone. Naturally, he can't do that. They're written by many different departments, accounting, everything. It was just one long battle with Stone.

The Referee: Well, I think he has answered it in this respect, that he said he was familiar with the basic documents, that in some instances there were other coding letters, and so forth, that were in ad-

(Testimony of Earl Johnson.)

dition to the basic documents that you are familiar with.

The Witness: Correct.

The Referee: Was that your testimony?

The Witness: That's right.

The Referee: So, when Mr. Walsh asks you if you are familiar with all of the documents in this Hedgeside transaction, if it included these coding letters, and so forth, why, your former answer would be that you are not familiar with those?

The Witness: That's right.

The Referee: Go ahead, Mr. Walsh.

Mr. Walsh: Q. Now, Mr. Johnson, is it your testimony [677] that you are in a position at the present time to testify all of the basic documents used in the transactions of Hedgeside Distillery?

Mr. La Shelle: Now, just a moment, Your Honor, we object to the form of that question. He has asked, "Are you in a position to testify?" That is for this Court to determine.

The Referee: Well, he doesn't have to testify on that subject at this time. On the cross examination as to his knowledge and practices of the San Francisco and New York office and his basic training as an accountant, and so forth, Mr. Walsh, he can be examined. As to documents that may or may not be required under those practices, as he knows them, as long as you are not asking him specifically about his knowledge of certain documents that are here. But as to his knowledge generally as to the

(Testimony of Earl Johnson.)

basic documents which would be required in all of these transactions, yes, he should answer that.

Mr. Walsh: Q. Well, Mr. Johnson, can you tell the Court now—Strike that out. Can you describe to the Court now all of the basic documents which are required in a transaction similar to the ones had with Hedgeside Distillery Corporation?

A. As far as payment is concerned?

Q. Read the question.

The Referee: The basic documents. [678]

A. The basic documents in connection with any transaction of this nature——

The Referee: That's right, of this nature.

A. Where we have a contractual obligation to fulfill, the basic documents, I have testified before that in any event we would require, either in the New York office or in the San Francisco office, a pro-forma, or facsimile copy, of the contract. We would require that in support of that payment. There would be a copy of the invoice submitted by the vendor. We would require that in evidence of payment after the payment has cleared in our Auditing Department. We would have a copy—or we would have the cancelled check which was issued in connection with that transaction.

Under our voucher system, we use a voucher form, on which are attached the invoice, and a reference would be made to the contract on the supporting documents that this here pertains to such-and-such contract.

I am having to talk general on this, because it

(Testimony of Earl Johnson.)

would apply not only in Hedgeside, it would apply in all. I have previously testified there are three principal—three documents.

The Referee: Just a minute. Just confine it to the Hedgeside, to this type of transaction.

The Witness: To reiterate, there would be maintained in the files a facsimile copy of the contract, of the contractual obligation, a copy or copies of the invoices in [679] support of payments or where we have been billed, and a copy of the cancelled check covering payment of that transaction.

The Referee: Any other basic document?

The Witness: Yes, there is a fourth basic document, but that would not necessarily be maintained in that department. That would be, as I have cited before, the receiving ticket or the—in the case which is at point now, the copy of the warehouse receipt, which due to production requirements is taken out of the Department and held at a several point or at another point.

The Referee: Would there be any other basic documents, regardless of what Department of Schenley they were kept in?

The Witness: Not as basic documents, no.

Mr. Walsh: Q. Well, Mr. Johnson, does your testimony also include the basic documents required by your Purchasing Department?

A. When—

Q. You can answer that question “Yes” and “No”, and then explain it if you want.

A. Yes, with an explanation, then.

(Testimony of Earl Johnson.)

Q. All right, you may explain.

A. When I was going over these cases the other day in Court, I cited that there were three types of transactions. The first was, I cited the use of the purchase order. The second I said, in lieu of the purchase order, the copy of the contract [680] was used. I believe that's the way my testimony went in.

The Referee: Well, now, Mr. Walsh's question, so there is no misunderstanding, including the purchase order, would your answer that you gave with reference to the basic documents in these transactions also take into consideration the Purchasing Department? A. No, no.

Mr. Walsh: Q. In other words, Mr. Johnson, you wouldn't be in a position at this time to testify as to the transactions which were had by the Purchasing Department of Schenley's with the Hedge-side Distillery Corporation?

Mr. La Shelle: Now, just a moment, Your Honor. I will again object to the form of that question in asking this witness if he is in a position to testify. I think that is a matter for the Court to determine as to what he can testify to and what he can't, and that's the vice of that question.

Mr. Walsh: I'll submit it.

The Referee: You may answer it, Mr. Johnson.

A. As far as I can recall now, the Purchasing Department would——

Mr. Walsh: Q. Just answer the question "Yes" or "No", and then you can explain your answer.

A. Read the question again, please.

(Testimony of Earl Johnson.)

(The last question was read by the reporter.)

Mr. La Shelle: We object to that question again, Your Honor, that it assumes there were transactions between the [681] Purchasing Department and Hedgeside. He has not yet been asked that. These questions all assume something——

The Referee: I think that he testified at our last hearing, with reference to receiving copies of the contract, which, in effect, then, would be one of their basic documents under number 2.

The Witness: That's right.

The Referee: That you spoke of, isn't that true?

The Witness: Yes.

The Referee: And whom would you receive that copy of the contract from, what department?

A. From our Legal Department or from our Cashier and Contract Department in New York.

Mr. La Shelle: There has been no testimony yet at all, that I know of, that there were any negotiations between the Purchasing Department, as such, and Hedgeside and Franciscan on the other hand.

The Referee: Was there, Mr. Walsh?

Mr. Fisk: The contracts in Evidence.

Mr. Walsh: My understanding of the testimony is that Mr. Johnson testified that there were certain documents of certain transactions handled by the Purchasing Department.

The Referee: That was my recollection. That's why I ask him with reference to the contracts, but I am certainly in a positoin to be corrected. My mind is not that infallible. Did you testify with

(Testimony of Earl Johnson.)

reference to the Purchasing [682] Department——

A. No.

The Referee: You did not? A. No.

The Referee: Very well. The question may go out.

Mr. Walsh: You mean the——

The Referee: I mean your question with reference to asking him whether or not he is in a position to testify with reference to the documents.

Mr. Walsh: Your Honor, I would like to submit the record on that, because Mr. Johnson very definitely gave me the impression that there were certain elements handled by the Purchasing Department.

The Referee: He did say, Mr. Walsh, I recall that he said that a purchase order would be the first type, isn't that true?

The Witness: That's right.

Mr. Walsh: Well, Your Honor——

Mr. La Shelle: Your Honor, if I may——

Mr. Walsh: Will you let me finish, Mr. La Shelle? Now, Your Honor, having in mind that testimony, we are entitled to ask him on voir dire his knowledge of the documents kept by the Purchasing Department. For all we know, there are other documents that are very material to these transactions.

Mr. La Shelle: Your Honor, if I may just make this for clarity? I don't purport to be an expert on the setup and the way large companies operate; but I think that Frank is [683] misconceived as to the Purchasing Department only goes into operation if

(Testimony of Earl Johnson.)

they make a purchase. If another department makes the contract and creates a legal obligation, it's my understanding I don't think the Purchasing Department would play any part in this. They purchase and——

Mr. Walsh: In this case they didn't purchase.

The Referee: That's just the point.

Mr. Walsh: Your Honor, that's what I am trying to find out.

The Referee: That's why I asked you, Mr. Walsh; in fact, I recall the witness testifying as to the three general types of transactions that Schenley's had, and one of them was by purchase order, but whether or not that method was used in this particular series of transactions, I am not in a position to answer.

Mr. La Shelle: It should first be determined, would the Purchasing Department play any part in this type of transaction? If it doesn't, then it's out.

The Referee: That is the reason I asked the question before, Mr. La Shelle. I am not certain.

Mr. La Shelle: The vice of his question was the assumption that it had, don't you see? They ask the witness, "What do you do in such-and-such a transaction" before they first ask him, "Did you have such a transaction". Then, having established that, he can go on from there.

The Referee: Mr. Walsh, you will have ample time. [684] We are going to recess until two.

Mr. La Shelle: Let the record show that Mr.

(Testimony of Earl Johnson.)

Walsh has unlimited opportunity of cross examination.

(Laughter.)

(Thereupon an adjournment was taken until 2:00 o'clock p.m.) [685]

Afternoon Session—2:00 o'Clock p.m.

EARL JOHNSON

previously sworn, resumed the witness stand, and testified further as follows:

Further Voir Dire Cross Examination

The Referee: Just before the recess, Mr. Walsh was going to check into the testimony of Mr. Johnson with reference to purchases.

Mr. Walsh: The reporter hasn't completed the transcript of the last day's hearing, but we have the question and answer here, that I submit leads right into this situation of the question of purchases. This is on page 511 of the transcript. The question is asked Mr. Johnson on direct examination. (Reading):

“Mr. La Shelle: Q. Now, with reference to purchases made, not on the West Coast, but purchases made in New York, do you know what that procedure is, as far as preserving documents?

A. Yes, I do.

Q. Tell us what that is.

A. I wasn't in the New York office——”

(Testimony of Earl Johnson.)

Now, I submit that question on direct examination brings in the question of purchases.

Mr. La Shelle: My point is, the purchases can be made [686] by contract outside of the purchase. I have no objection to this witness being asked if in a transaction of this nature the Purchasing Department plays the part that it does. I mean, if it does, he can be examined.

The Referee: Does it, Mr. Johnson? Does your Purchasing Department play any part, as far as these series of transactions with Hedgeside are concerned? A. No.

Mr. Walsh: Q. Well, now, Mr. Johnson, having reference to Petitioner's Exhibit 22-B, which is already in Evidence, who handled the transaction relating to that particular——

Mr. La Shelle: Now, wait a minute, the witness can't remember these things by numbers.

Mr. Walsh: Well, I'll tell you, 22-B is the contract between Hedgeside and Schenley.

Mr. La Shelle: Of October 13, 1947.

Mr. Walsh: Of October 13, 1947.

Mr. La Shelle: Let the record show that the witness has the Exhibit.

The Witness: Could I have the question repeated?

Mr. Walsh: I'll reframe my question. Strike that question out.

Q. What documents do you have in your possession now, Mr. Johnson?

(Testimony of Earl Johnson.)

A. It's Exhibit 22-B for Identification. It's in Evidence now. And it says, with—— [687]

Q. Just give me—is that the contract dated October 13, 1947?

A. It's the contract dated October 13th, 1947, between Schenley Distillers Corporation and Hedge-side Distillery Corporation.

Q. Yes. Now, Mr. Johnson, in this particular type of transaction had between Schenley's and Hedgeside Distillery Corporation, what department of Schenley's would handle that type of transaction?

Mr. La Shelle: Your Honor, I submit this is not voir dire examination now. This would be proper cross after I get through with using these Exhibits.

Mr. Walsh: I am not asking about this particular——

The Referee: You are asking about the type.

Mr. Walsh: That type of a transaction.

The Referee: You may answer. Overruled. That type.

A. Principally our Compliance Department.

Mr. Walsh: Q. Your Compliance Department.

A. Yes.

Q. Are you familiar with the records of the Compliance Department of Schenley's relating to that type of transaction?

A. I am familiar with such records as are used or subject to audit.

Q. I'll repeat the question again: Are you

(Testimony of Earl Johnson.)

familiar with all of the records kept by the Compliance Department relating to that type of transaction?

Mr. La Shelle: Well, I submit, your Honor, that goes [688] beyond the realm of cross examination on voir dire.

A Compliance Department is what the name implies, complies with a million and one things that this man couldn't possibly know about.

The Referee: Sustained.

Mr. Walsh: Your Honor, please, may I make an argument on that? Your Honor, what I am driving at is this: I know what Mr. La Shelle is going to do. He is going to have Mr. Johnson testify as to his knowledge of a certain department, and from his knowledge of the activities or procedures of a certain department he is going to try to attempt to introduce in Evidence certain documents.

Now, I submit, your Honor, that we have a right to know if there are any other documents, or if he is familiar with all the documents which are required in a particular transaction. What Mr. La Shelle is trying to do is to introduce in Evidence only certain, what he calls basic documents relating to a transaction. Now, for all we know, and we're trying to find out, that there are other documents, other supporting documents in each of these particular transactions, which may or they may not throw a different light on the entire transaction.

Mr. La Shelle: If I may be heard on that, your Honor——

(Testimony of Earl Johnson.)

The Referee: Just a minute, Mr. La Shelle. I think that Mr. Johnson has testified on two occasions with reference to the basic documents that are used—or that Schenley [689] have in the transaction such as we have before us now. He also mentioned the fact with reference to contracts that had been entered into, and then certain goods were furnished Schenley in accordance with those contracts.

Now, I don't expect Mr. Johnson to be in a position to testify with reference to the documents or the contracts, or their legality or anything else concerning them, from the Compliance Department. I do expect him to know the necessary documents with reference to his particular department and the procedure to be followed.

Now, one of the methods is, they receive a contract. That was the number 2 method you talked about, is that correct? A. Yes, sir.

The Referee: The number 1 is the purchase order? A. Yes, sir.

The Referee: Now, if he gets a contract from the Compliance Department, or his department does, that sets forth certain basic things that are summarized for the Accounting Department's proof by the Compliance Department, is that true?

A. Right.

The Referee: And then, in addition to that—

Mr. Walsh: Just a minute, your Honor, how can he testify—that's what I am trying to find out from the witness. Are those all of the documents

(Testimony of Earl Johnson.)

relating to that transaction had by the Compliance Department?

The Referee: Well, Mr. Walsh, what I am saying is, [690] this witness has already testified that that is what happens in their operation after a contract has been entered into. But he also admitted that he didn't know what had gone on before the final contract was finally entered into.

Mr. Walsh: But in the face of that testimony, your Honor, you have overruled the objection to all of his testimony.

The Referee: No, what I have said is this: that I am not permitting you to examine this witness with reference to the documents in the Compliance Department.

Now, we have Mr. Woolsey here, who testified that he either was the head man or had some such position with reference to the Compliance Department. If there is anything you need, Mr. Woolsey is available to offset that. Mr. La Shelle has put Mr. Woolsey on the stand, and I am sure he is available.

Mr. La Shelle: Oh, sure.

Mr. Walsh: That was the understanding, your Honor.

The Referee: Yes, but that is in the Compliance Department. Now, this gentleman here is in the Accounting Department, is that true?

The Witness: Yes.

Mr. Walsh: Q. Is a sight draft one of the basic documents in this particular type of transaction?

(Testimony of Earl Johnson.)

A. No.

Q. It is not? [691]

A. No. It's not required—

Q. That isn't my question, Mr. Johnson. Read the question again, please, Miss Reporter.

(The last question was read.)

Q. Well, Mr. Johnson, did Schenley pay the money due on one of these obligations without a sight draft?

A. That would depend entirely upon the requirements of the contract.

Q. Well, having in mind the type of transaction which was handled with Hedgeside, did they pay the money due on these obligations represented by sight draft—

Mr. La Shelle: And I submit—

Mr. Walsh: Let me finish.

Mr. La Shelle: Your Honor, we are going beyond the realm of *voir dire*.

The Referee: I don't think so, Mr. La Shelle. Mr. Walsh has asked with reference to the number 2 method that you spoke of, would a sight draft be required in that. I am adding my statement to Mr. Walsh's question.

A. No.

Mr. Walsh: Q. And, Mr. Johnson, as I recall your testimony, you described the sight draft method as the number 2 method? A. Yes.

Q. Well, let's go over it again and have you tell us again. I don't understand what you are talking about.

(Testimony of Earl Johnson.)

A. I believe I have already testified to this. [692]

Q. Well, I want to hear it again.

A. I believe I have already testified to this thing two or three times.

Q. Well, this will make the fourth.

A. All right. I said that, under the second type of transaction, by which transaction which we would enter into, there were four basic types of documents required: the contract, the copy of the vendor's invoice, a copy—or not a copy, but the cancelled checks upon completion of the purchase, and, fourth, a receiving ticket or the equivalent, which in the case which we are dealing with now would be the warehouse receipt. Those four were the basic documents, which I believe I cited.

Q. Well, now, confining yourself solely to the type of transaction had with Hedgeside, would a sight draft be required?

Mr. La Shelle: Now, there, again, your Honor, I submit that that is beyond voir dire, and the answer has already been given. It's been asked and answered. He said it would depend upon the provisions of the contract.

The Referee: He already answered that the answer was "No", as I remember the testimony of the witness. Not necessarily one of the basic documents, is that right?

A. That's right.

The Referee: Q. Would it be required, then, in answer to Mr. Walsh's question? [693]

A. I can qualify the answer of "No" that I gave

(Testimony of Earl Johnson.)

by stating that on this particular contract with Hedgeside and the contract with Franciscan, in addition to the payments which were made on the basis of sight draft, we also made payments on the basis of audits, which were not made to either one of the two corporations through the bank but were made directly to the corporations. Does that answer it?

The Referee: Well, now, just a minute. You have me slightly confused. Read Mr. Johnson's answer.

Mr. La Shelle: I might state, your Honor, to clear that up——

Mr. Walsh: Just a minute, your Honor, please, just a minute——

Mr. La Shelle: This was made just as an aid to the Court, and if the Court doesn't want it, just say so.

The Referee: Wait until the court reporter reads Mr. Johnson's answer until we dispose of this question here, and then you can make your offer. Will you read Mr. Johnson's answer?

(The last answer was read by the reporter.)

The Referee: Q. Well, then, the sight draft was included in these transactions with Hedgeside——

A. It was included, but——

Q. In all instances, or just in some of the instances?

A. In some of the instances, not in all.

Q. Not in all? [694]

A. Not in all, no, because, as I have stated in

(Testimony of Earl Johnson.)

my answer, your Honor, we made additional payments to those which were made through sight draft, so you have a combination. You have two types of payments which were made.

Mr. La Shelle: Your Honor, I think at this time——

Mr. Walsh: Just a minute——

Mr. La Shelle: Just a moment, I have something that I think would be of some help to the Court here.

Mr. Walsh: Just a minute, your Honor.

The Referee: I don't know what it is, Mr. Walsh.

Mr. Walsh: Listen, I am on cross examination, and if he's not satisfied with my type of examination, he should make his objection, not interject and try to talk to the Court. That's the proper way of conducting the examination.

The Referee: Well, now, just a minute, Mr. Walsh. Mr. La Shelle has predicated his interruption with the statement that maybe he has something that will be of some assistance or help to the Court.

Mr. Walsh: That's on redirect.

The Referee: Wait a minute, may be it's a short-cut to all of this; I don't know until I hear what it is. I am not in a position to pass on it. In the event that it is erroneous and then you want it stricken, you may then make the motion, and if I find that it is not proper, it will go out. [695]

Mr. La Shelle: I am not even going to say anything. I am going to ask the Court to read something.

(Testimony of Earl Johnson.)

Mr. Walsh: Am I going to be constantly interrupted in my cross examination by Mr. La Shelle, in fact, every two minutes about some offer he has to make?

The Referee: No, Mr. Walsh.

Mr. La Shelle: Your Honor, with reference to the drafts, this document is already in Evidence. I am quite sure that the Court has not had an opportunity to read the entire document. It may never even be necessary for the purposes of this case. It's a long, technical thing, but if the Court will read Section 11—

The Referee: From what Exhibit?

Mr. La Shelle: That's Exhibit Number—oh, oh.

Mr. Walsh: What is it, Mr. La Shelle?

Mr. La Shelle: 22-B. The Court will see how the method was set up, which I think will immediately clarify what the witness has said. It goes over into the next page.

The Referee: The mere fact that this contract says it should be handled this way doesn't prove that it was handled that way.

Mr. Walsh: Your Honor, what has that got to do with my examination of the witness?

Mr. La Shelle: I just asked the Court to read that section, section 11.

The Referee: Mr. Walsh, you may proceed.

Mr. Walsh: Now, will you read the last question and answer, please?

(The reporter read as follows):

“Mr. Walsh: Well, now, confining yourself solely

(Testimony of Earl Johnson.)

to the type of transaction had with Hedgeside, would a sight draft be required?

Mr. La Shelle: Now, there, again, your Honor, I submit that that is beyond voir dire, and the answer has already been given. It's been asked and answered. He said it would depend upon the provisions of the contract.

The Referee: He already answered that the answer was 'No', as I remember the testimony of the witness. Not necessarily one of the basic documents, is that right?

A. That's right.

The Referee: Q. Would it be required, then, in answer to Mr. Walsh's question?

A. I can qualify the answer of 'No' that I gave by stating that on this particular contract with Hedgeside and the contract with Franciscan, in addition to the the payments which were made on the basis of sight draft, we also made payments on the basis of audits, which were not made to either one of the two corporations through the bank but were made directly to the corporations. Does that answer it?

The Referee: Well, now, just a minute. You have [697] me slightly confused. Read Mr. Johnson's answer.

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Mr. Walsh: Just a minute, your Honor, please, just a minute——

Mr. La Shelle: This was made just as an aid to

(Testimony of Earl Johnson.)

the Court, and if the Court doesn't want it, just say so.

The Referee: Wait until the court reporter reads Mr. Johnson's answer until we dispose of this question here, and then you can make your offer. Will you read Mr. Johnson's answer?

(The last answer was read by the reporter.)

The Referee: Q. Well, then, the sight draft was included in these transactions with Hedgeside—

A. It was included, but—

Q. In all instances, or just in some of the instances?

A. In some of the instances, not in all.

Q. Not in all?

A. Not in all, no, because, as I have stated in my answer, your Honor, we made additional payments to those which were made through sight draft, so you have a combination. You have two types of payments which were made."

Mr. Walsh: Q. Now, Mr. Johnson, in this type of transaction with Hedgeside, how would Schenley be notified [698] of the demand by Hedgeside of the payment of the obligation?

Mr. La Shelle: We object to that as not voir dire, your honor.

Mr. Walsh: Well, your Honor.

The Referee: We're going beyond the—

Mr. Walsh: Your Honor, he testified directly, he testified without any doubt on direct examination that one of the elements in this type of transaction—I'll read it to you: (Reading):

(Testimony of Earl Johnson.)

“The first one was the contract, the second one was the invoice, the third was the warehouse receipts, the fourth, the bank to notify Schenley by sight draft.”

That’s his testimony on direct examination. Now, he has testified on cross examination that the sight draft was not required on this type of transaction. So I want to have the record absolutely clear.

Q. Then, what do you mean on direct examination by the statement that the bank would notify Schenley by sight draft?

Mr. La Shelle: Your Honor, I submit that this is proper cross examination, but that it is not voir dire cross examination. That’s my sole point.

The Referee: Well, now, just a minute.

Mr. La Shelle: They are asking what was done in this case.

The Referee: Now, we interrupted direct examination to [699] afford Counsel for the Trustee and Counsel for the Anglo Bank an opportunity to examine the witness with reference to his knowledge of the procedure on the West Coast and in the New York office with reference to the Schenley operation, accounting practices, and so forth.

Now at this time the cross examination must be limited to that phase of it, without any prejudice against the attorney for the Trustee and the attorney for the Bank going into any phases of the cross examination; I mean, of the direct examination.

Mr. Walsh: That’s right. I am not attempting to go into that; I am just trying to test the witness’

(Testimony of Earl Johnson.)

knowledge of the procedures and documents required in this type of transaction.

The Referee: Very well. You may answer.

The Witness: I don't know where we left off. I have to go back to the last question again.

(The last question was read by the reporter.)

Mr. La Shelle: That is what I objected to, as I recall it, as not *voir dire*.

Mr. Ward: The objection was sustained.

Mr. Walsh: I'll reframe this.

The Referee: The original question is withdrawn, Mr. Walsh?

Mr. Walsh: Yes.

Q. What do you mean by your statement on direct examination [700] that a bank in this type of transaction would notify Schenley's by sight draft?

A. The particular contract may or may not state that a sight draft would be required in connection with certain types of specific payments. If a contract stated that a sight draft were necessary, then we would pay on the basis of that sight draft, but we would still require as basic supporting documents only the four which I have mentioned in past testimony: the additional copy of the sight draft might or might not be maintained as support. It's not a basic requirement. It could be, and normally we would maintain that.

Mr. Walsh: That's all, your Honor.

Mr. Fisk: Your Honor, in the light of—May I ask just a couple of questions?

(Testimony of Earl Johnson.)

Voir Dire Examination

Mr. Fisk: Q. Mr. Johnson, at the last session you outlined three methods of practice, did you not? A. Yes.

Q. The first method I believe you described generally as an order of purchase with that contract?

A. That's right.

Q. We'll forget that. The second method you described as a sale on contract? A. Right.

Q. In connection with the second method, you outlined a number of requirements in order to follow the process of Schenley, and one of those requirements was—you correct me, [701] if I'm wrong—where there was a delivery of goods under a contract that there be cash delivered, the Bank or whatever agent was handling the transaction, in payment of sight draft, isn't that correct?

A. Not in all cases, no.

Q. Well, now, in what case wasn't it, and we're talking about number 2; in what case didn't you have a sight draft under number 2?

A. I believe, Mr. Fisk, that I was talking in generalities at that time, that I was talking contracts. The contract form of transaction. Now, the contract, the terms of the contract itself would provide the method which would be followed. We might not make any payments under a contract through a bank; we might make direct payments.

Q. All right, where you had a contract that required a production contract under your number 2, that you required payment, cash, against sight

(Testimony of Earl Johnson.)

draft, was the sight draft one of your basic documents?

A. I've already answered that by saying "No".

Q. Well, would you answer it again?

A. No.

Q. It was not?

A. No.

Q. How would you pay the bank in order to conform to that contract under the method you are speaking of?

A. When I'm citing basic documents, I cite—

Mr. Fisk: Wait just a minute, I am going to ask that that answer go out as not responsive. [702]

Mr. La Shelle: Just answer the question and explain it, if it's necessary.

The Witness: Would you mind reading it again?

(The last question was read by the reporter.)

A. I'll have to go back further than that.

Mr. Fisk: Q. Do you understand the question?

A. I believe so, now. If a sight draft is required by the contract at the time the payment was made, we would require the presentation of that sight draft.

Q. As a basic document?

A. No, not as a basic document in the terms in which I have been dealing in basic documents.

Q. You would require a sight draft before you would make payment, though, would you not?

A. Yes, if it were provided for.

Q. But you would not treat that sight draft as

(Testimony of Earl Johnson.)

a basic document which you would have to retain in your files, is that right? A. No.

Q. And——

Mr. La Shelle: Wait a minute, I don't understand that.

The Referee: What does the "No" mean?

Mr. La Shelle: What does the "No" mean?

The Witness: I saw that after. There is a compound question there, I believe.

Mr. Fisk: No, I don't believe it's compound. It may be ambiguous. [703]

Mr. Walsh: It's not up to the witness——

The Referee: Mr. Johnson, you understand Mr. Fisk's question?

The Witness: I thought I understood it. Could I have it reread?

Mr. Fisk: I'll reframe the question:

Q. Why don't you treat the sight draft as a basic document in that instance?

A. Because, upon the conclusion of the transaction and after payment is made, the cancelled check is better evidence of the payment having cleared against that contract. The other supporting documents are more important than the sight draft itself. The sight draft would be only an intermediary support.

Q. All right. When you go to the bank and examine the papers under this method, too, do you examine the sight draft to see how much money to pay, or do you examine the invoice?

A. We would examine the invoice.

(Testimony of Earl Johnson.)

Q. If there is a discrepancy between the amount required in the invoice and the amount required under the sight draft, which do you pay?

A. Probably neither. I would ask for a correction, because the bank would not accept anything different than the sight draft, as I understand it.

Q. The sight draft, then, determines the amount of money you pay the bank, isn't that true, and not the invoice? [704]

A. No, you may have a sight draft in the hands of the bank which will not agree with our basic supporting documents. We don't then pay to the bank the amount of the sight draft. We would ask that a correction or check be made.

Q. Will the bank deliver you the documents or any of them until you pay the amount of the sight draft? A. No.

Q. Then the sight draft determines the amount of money you have to pay the bank in order to get the documents, isn't that correct?

A. Yes, but I have to explain on that too. If the sight draft did not agree with the supporting documents which we already had, we would not pay on the basis of sight draft. We would ask for a correction of the sight draft.

Q. But you couldn't get the goods or the documents with the bank in conformance with this contract until you pay the amount of the sight draft, isn't that true? A. That is correct.

Q. The sight draft is subsequently returned to you, cancelled, isn't that correct? A. Yes.

(Testimony of Earl Johnson.)

Q. But you do not retain it, and you do not regard it, as a basic document?

A. We do not regard it as a basic document. Normally, we do retain it.

Q. Now, you also get back the cancelled check, do you not? A. Yes. [705]

Q. But you do retain the cancelled check?

A. Yes.

Q. But you do not retain the sight draft?

Mr. La Shelle: I submit, your Honor, that that has been asked and answered. He said "Normally we do, but we don't regard it as a basic document." And I think that there is a limit that this witness should be called upon to answer the same questions.

The Referee: He is asking about the retention of the documents. You may answer.

A. Normally we would retain the copies of the sight draft upon cancellation in our files, but without the copy of the sight draft we would still have what we consider to be basic documents in support of payment under the contract.

Q. But you wouldn't have all of the basic documents, isn't that correct?

A. As far as we are concerned, we would have the basic documents, the items which I have cited in past testimony, the four basic documents.

Q. Is it your practice to retain only the basic documents? A. No.

Q. Well, what determines whether a document is basic or not?

A. I believe I have testified in the past in my

(Testimony of Earl Johnson.)

opinion, and in all my experience as an accountant, we consider that there are in this type of transaction basic business documents. In addition to that, there may be many more. [706]

Q. Is it your testimony that according to sound, general accounting practice, in a transaction of this kind, the canceled check is retained but not the sight draft?

Mr. La Shelle: Now, your Honor, I submit that this, again is asked and answered, and now it's about the fifth time coming up. He said he didn't consider it as basic document, normally they retained it; and it's just going over and over the same question again. I think there is a limit to this.

The Referee: You may answer. Overruled.

Mr. La Shelle: And additional objection—

The Referee: He didn't ask him about any basic document. He is asking him about the retention.

Mr. La Shelle: I know, but it's the vice of all of these questions that have been coming in. It assumes something absolutely contrary to what the witness has testified, and something that is not in evidence. It assumes that it is not retained. He has just said about six times, it is normally retained. In this question, it assumes it is never retained.

The Referee: Mr. La Shelle, Mr. Fisk is cross examining the witness on the practice. Now, he certainly is entitled to ask him the question with reference to what documents are retained.

(Testimony of Earl Johnson.)

Mr. La Shelle: No, but he assumes that it's not retained.

The Referee: He doesn't assume anything.

Mr. La Shelle: Yes, it does. [707]

The Referee: All right, if it assumes that, you clarify Mr. Johnson's answer to Mr. Fisk's question. The objection is overruled. Then if it needs clarification, you may go further.

The Witness: To make sure of my ground, I would like the question repeated.

(The last question was read by the reporter.)

A. Yes, with an explanation. In explanation of that, we always retain, that is, within the Company requirements, the cancelled check. In other words, that may be for a period of years. In some cases we destroy the cancelled check and have photostats made of it, retain it. A sight draft is normally retained in our files as one of the documents which we maintain in our files in support of these business transactions. But it is not a basic document which supports that transaction. We have what we consider to be better evidence than the sight draft itself. The cancellation of the check, the clearance of the check through the bank, is our evidence of final payment.

The Referee: Pardon my interruption, Mr. Johnson. Mr. Fisk is asking you with reference to the retention of these two particular documents, regardless of basic documents or not. He is asking you about Schenley's preserving the cancelled check and the sight draft. Now, what is your testimony with reference to that?

(Testimony of Earl Johnson.)

A. I would say the cancelled check is always retained; the [708] sight draft is normally retained but not required to be retained.

Q. According to your general practice, do you retain the cancelled check?

Mr. La Shelle: Just a moment, your Honor, that has been asked and answered on voir dire at least two or three times.

Mr. Fisk: Never been answered at all.

The Referee: I have never heard the answer.

(Discussion off the record.)

The Referee: I'll overrule the objection. And generally, Mr. Johnson, how long do you retain a cancelled check in this type of transaction?

A. Well, I can say at least three years.

Mr. Fisk: Q. Normally, how long do you retain the sight draft—normally, I am using your word.

A. Normally, we would retain it at least as long as the check.

The Referee: Mr. Walsh?

Mr. Walsh: I have no further cross examination for the Trustee on voir dire.

The Referee: Well, the Court will permit the witness to testify with reference to—you may proceed with the direct examination. The Court will permit him to testify with reference to his knowledge of the practice in New York and in San Francisco.

Mr. La Shelle: Just a number of things I would like to [709] take on redirect of voir dire for just a moment.

(Testimony of Earl Johnson.)

(Discussion off the record.)

Mr. La Shelle: 23, 24, 25-A, and 25-B are for Identification, your Honor, they are not in Evidence. Now, your Honor, at one time these were marked for Identification. We were offering them in Evidence and there was some objection, and I passed it for the time being. At this time we reiterate the offer of these documents in Evidence. They were qualified as to signatures, and so forth. Now, in the testimony of the witness here, the contract, of course, is the basic origin of the transaction such as this character. I mean, I am about to discuss in direct examination these various transactions here with the Franciscan Farm and Livestock Company, the drafts, invoice, and payments, and warehouse receipts.

Now the first one that I am going to deal with, simply for clarification, so the Court can understand my offer, took place in the spring of 1947. At that time, according to 23, 24, 25-A, there was a contract between Schenley and Franciscan, 24, 5 being notifications with reference to yield, proof gallons, and something like that. Under that contract, section 8, it states on page 7:

“The title to the distilled spirits or whiskey to be produced hereunder shall pass upon delivery to us, F.O.B. carrier, at Yountville, as above specified. Payment shall be cash against sight draft [710] with shipping documents attached, drawn upon the Bankers Trust Com-

(Testimony of Earl Johnson.)

pany, 16 Wall Street, New York, or such other bank as we from time to time specify.”

Mr. Fisk: I am going to object to reading in Evidence documents before they have ever been admitted.

Mr. La Shelle: This is offered purely by way of argument.

Mr. Fisk: I submit that is improper.

The Referee: Just a minute. First of all, by your own statement, Mr. La Shelle, you mentioned the fact that there were three Exhibits or four Exhibits that were formerly marked for Identification, but through some reason or other were never admitted in Evidence; is that right?

Mr. La Shelle: That's right.

The Referee: Now, first of all, I haven't had any offer of these documents at this time to be received in Evidence, and, secondly, the Court is not familiar at the moment with whether or not an objection was made, or whether they were merely marked for Identification.

Mr. La Shelle: The Court, as I recall it, objected to them.

The Referee: Well, if that be the fact, I will go along with Mr. Fisk's statement that these documents are still marked for Identification. They're here, but not Evidence, so you will have to proceed at the moment in the [711] normal way without reading a portion of the——

Mr. La Shelle: All right, then, I'll proceed in this way. We are reiterating our offer, now, in Evi-

(Testimony of Earl Johnson.)

dence, these copies of Petitioner's Exhibits for Identification 23, 24, 25-A and B, and I ask the Court, then, to read this document so it can pass, and be in position to pass upon its admissibility. And I have certain statements to make with reference to the contents of that contract to explain its admissibility.

The Referee: Well, before you read into it, you should certainly afford the Respondent Counsel an opportunity——

Mr. La Shelle: Your Honor——

The Referee: If you were making the offer in Evidence of these documents—is that what you are doing?

Mr. La Shelle: Yes. Now, may I make this statement. Counsel for the opposition have had photostatic copies of this document for weeks and have had every opportunity in the world to examine it, and have examined it, and this young man who was over here to my office came over to my office at my invitation and compared the originals——

Mr. Fisk: What in the world is the purpose of this statement, anyway? Who is complaining but you?

The Referee: Nobody is complaining.

Mr. La Shelle: Your statement that they have not had an opportunity to examine. [712]

The Referee: I said they haven't had an opportunity to object to your offer.

Mr. La Shelle: Then I state this, your Honor: that unless your Honor reads that contract, par-

(Testimony of Earl Johnson.)

ticularly the section in question, your Honor is not in a position to pass upon its——

The Referee: Well, it is entirely possible I wouldn't have to read it, in the event that the Respondents made no objection to your offering it in Evidence. But the Court doesn't know what their action is going to be until they have been afforded an opportunity, and until you have made the offer in Evidence.

Mr. La Shelle: I may have misunderstood you. I thought your Honor said "an opportunity to examine".

The Referee: Oh, no, an opportunity to object, and frankly, the Court at the moment is not aware of what their former objection is, if one were made.

Now, gentlemen, back to where we started from. Mr. La Shelle is now offering in Evidence Exhibits for Identification——

Mr. Fisk: May I have them one at a time, your Honor?

The Referee: Yes. Exhibits heretofore marked for Identification, namely, letter from Schenley to Stone, 11/1/45 re the 1945 Franciscan contract, Petitioner's Exhibit Number 24 for Identification; letter from Schenley Distillers Corporation by M. J. Nauheim, Vice President, to R. I. Stone, dated December 5, 1945, Petitioner's Exhibit Number 25-A for Identification; letter from Franciscan Farm and Livestock Co. [713] by R. I. Stone to Schenley Distillers Corporation, dated October 13, 1947; Petitioner's Exhibit 25-B for Identification, contract

(Testimony of Earl Johnson.)

made and entered into this 13th day of October, among Schenley Distillers Corporation, Franciscan Farm and Livestock Co., and R. I. Stone.

Mr. Fisk: I would like to make my objections separately, your Honor. I don't think the documents are related. As to Petitioner's for Identification 23, I would like to object to it on the ground it is irrelevant, incompetent and immaterial; there is no proper foundation laid to show the execution or delivery of the document. It purports to be on its face——

The Referee: Pardon me, gentlemen, Petitioner's Exhibit No. 23 is in Evidence.

Mr. Walsh: I don't think so, your Honor. Yes, it is, 351—just a minute.

Mr. Fisk: It was withdrawn from Evidence, page 368.

Mr. La Shelle: Your Honor, can I make a statement there?

Mr. Fisk: I can tell you what the statement was, I can tell you from recollection. What happened is, the document was offered in Evidence, and an objection was raised by us on the same ground that I am raising now, and the Court said, "Well, I don't know anything about signatures. There is nobody's signature that has been identified, or anything of that kind," and Mr. La Shelle then withdrew his offer as [714] to Franciscan documents. He did put in the Hedgeside documents. These are all Franciscan. This is an agreement between Stone and Schenley.

(Testimony of Earl Johnson.)

Mr. La Shelle: Your Honor, may I be heard on that, because it is directly contrary to what Mr. Fisk states.

The Referee: We are now just talking about 23.

Mr. La Shelle: 23, yes. My understanding of 23 and my understanding of this, without being in any way binding on anybody, is my personal belief that this was marked in Evidence in error. I might state there are so many things here that you could easily make a mistake as you go along. That's my recollection.

Now, my recollection is further, and I am very definite on this point: These were all qualified at the same time as the Hedgeside documents were, and Mr. Woolsey was on the stand, identifying his signature; he identified Nauheim's signature, and he identified Stone's signature, and Stone having signed some of the documents in his presence and was thoroughly familiar with his signature. On the basis of that testimony, the Hedgeside documents went in Evidence with little or no objection. I think objection was made and it was overruled. The exact type of testimony as to the signatures, execution of those documents, was the same as Hedgeside. There was some objection made to it at the time. My recollection was that the Court said something in the way of an informal objection, in any event, the Court [715] made a remark that "I don't know anything"—at the time it wasn't particularly important to me, and I said, "Well, we'll mark them for Identification for the time being and come to that later".

(Testimony of Earl Johnson.)

But I do believe this was marked in Evidence in error. I think that they were all marked, supposed to be marked that other way.

The Referee: Mr. Ward, can you help us?

Mr. Ward: Shall we go off the record?

Mr. Fisk: I want to read this, page 356 of the record: (Reading):

“The Referee: The objection is overruled. Number 23 for Identification, Number 23 in Evidence.

Mr. Fisk: Your Honor, I want to make an additional objection to this contract, in that it is not in anywise tied up to these matters. Here is a contract by R. I. Stone, individually, and Schenley Distillers, dated November 1, 1945, and I presume we have a witness here that is going to say he doesn't know anything about the contract except that those are his signatures; so I think we are entitled to have Mr. Nauheim come, if you are going to offer this in Evidence, to tell us something about it.

The Referee: Now, Mr. La Shelle, can you explain [716] to the Court how Hedgeside Distillery is affected by this document by the Franciscan Farm and Livestock Co.

Mr. La Shelle: Because there is Franciscan whisky involved here. The Heaven Hill whisky was produced at Franciscan.

The Referee: My question is this: Is R. I. Stone signing this agreement on behalf of Franciscan Farm and Livestock Co., or is he signing it on behalf of Hedgeside Distillery?

Mr. La Shelle: It says here, your Honor, please

(Testimony of Earl Johnson.)

that 'You, as an individual, doing business as Franciscan Farm and Livestock Company, are the owner and operator of a wine and fruit distillery at or near Napa.' In other words, this is a contract between Schenley on the one hand, and Stone as an individual on the other; and at that time, he was doing business under the firm name of Franciscan Farm and Livestock Company. This is entirely a different deal, and some of the Heaven Hill whisky, I am not sure, was produced—not the Heaven Hill whisky, but there was a contract in existence at that time——

The Referee: At this time, right now, is there anything before this Court that proves the statement that you have just made? [717]

Mr. Fisk: Not according to Mr. La Shelle's argument this morning.

The Referee: In other words, how was the Trustee at Hedgeside concerned or affected with this document?

Mr. La Shelle: Well, let me take a look at that Hedgeside for a minute.

The Referee: Of what?

Mr. La Shelle: Schedule C, the big, main one.

Mr. Walsh: Do you want my copy here?

The Referee: Here is 'B'.

Mr. La Shelle: 'B' is what I want."

I won't read the other; you can read it, if you want to.

"Mr. Fisk: He hasn't laid the proper foundation for the introduction in Evidence of this document.

(Testimony of Earl Johnson.)

The Referee: Well, Mr. La Shelle's statement is that, without proving his whole case all at one time, he certainly can identify this signature by Mr. Woolsey, as far as the signatures are concerned, as far as the execution is concerned. My point is there is nothing before the Court as yet that would bind the Trustee on this Petition in Reclamation because of any agreement that Stone had as an individual, or that Franciscan Farm and Livestock Company signed with Schenley. At the moment, there is not. [718]

Mr. La Shelle: Well, we will show that these spirits here, warehouse receipt number 3381, 3407, on page 2 of Schedule C, I forget the Identification number at the moment, were produced under this contract entitled—by reason of that contract. As I stated, I can't do it all at once. In other words, we show that we made a contract with 'A'. 'A' happens to be Franciscan. He produced the spirits we bought, and we paid for them, and they were stored at Hedgeside, which is showing their title.

The Referee: Well, now, technically, Mr. La Shelle, your document, although it is marked for Evidence, the Court can take care of that in a moment, if I so desire. Why would you be prejudiced in the least if it still remained for Identification, and Mr. Woolsey has identified the signature, and then the evidence that you are talking about that you are going to introduce through Mr. Johnson at a later date here, then, at that time if you have

(Testimony of Earl Johnson.)

offered the proper testimony, et cetera, then it would be admissible.

Mr. La Shelle: Well, it is simply this, Your Honor. Here is a contract with Stone, and here is—As a matter of fact, there, which comes first, the cart or the horse? [719]

Mr. Fisk: It's obvious which comes first here.

The Referee: But still, isn't it the same for this document to do you any good whatsoever, whether it is in Evidence or marked for Identification, or anything that you want to call it, it is of no use whatsoever until you tie up Stone or the Franciscan with this bankruptcy proceeding here; isn't that true?

Mr. La Shelle: Well, I'll tie it up with the evidence here.

The Referee: You haven't got it yet.

Mr. La Shelle: No, I can't do it all at once.

The Referee: That is why I am saying, why don't you offer that document?

Mr. La Shelle: If the Court prefers to do it that day, it's all right with me.

The Referee: Well, Counsel here has made an objection that there is not the proper foundation, and as long as the objection is not before the Court—

Mr. La Shelle: It's all right. It has been identified by Mr. Woolsey as the signatures, and, as I say, we can't do it all at once. You can remark it for Identification.

Mr. Fisk: It's wholly immaterial at this time until it's connected up.

(Testimony of Earl Johnson.)

The Referee: The document, Petitioner's Exhibit 23 [720] for Identification, as of November 9, 1949, and a few moments ago received in Evidence, is not received in Evidence at this time, and is Petitioner's Exhibit Number 23 for Identification".

Mr. La Shelle: All right now, here is my position. Mr. Woolsey, it will be shown in other parts of that transcript, positively identified Mr. Nauheim's signature of that as an executive officer of Schenley's. Mr. Nauheim can't add anything to the picture. One man can qualify another's signature as he knows it. Now, this contract is a contract between Stone as an individual doing business, and Franciscan, five years ago. We will show, and I make the Offer of Proof now, that during the time that contract was in effect, invoices and sight drafts credited through the New York bank were paid by Schenley warehouse receipts, were delivered pursuant to the method set up in this contract. Then they became later stored at Hedgeside.

Now, we're not claiming that Hedgeside was a party to that agreement. We are simply showing that we bought certain goods. Those goods, unfortunately, are stored at Hedgeside, and we are petitioning to reclaim them. We might have had a contract with Joe Doaks in New Orleans.

The Referee: Well, Mr. La Shelle, let me interrupt you again. Let's stay on the one proposition, namely, the offer of Petitioner's Exhibit Number 23 for Identification [721] in Evidence. Do you feel as though you're in any better position today than you

(Testimony of Earl Johnson.)

were on November 9, when Mr. Fisk has just read the testimony from that particular hearing, as far as the Court receiving it?

Mr. La Shelle: I'll qualify that by saying this: I feel that it should have been admitted in Evidence in the first place, and that I don't need to be in a better position. But by the Court's own theory of the case, I have now shown by this witness that a basic document in support of payment of goods, to start with, at the very beginning is the contract, and we have had a lot of testimony about it today and last week. Now, here is a basic contract which provides for payment by sight draft in a certain way with this man, and warehouse receipts in this, to be delivered——

The Referee: Yes, but who was the contract between?

Mr. La Shelle: Well, it says it right here?

The Referee: Yes, it does.

Mr. La Shelle: It says so right here:

“You represent that you as an individual, doing business as Franciscan Farm and Livestock Company, the owner and operator”——

and so forth. It's a letter contract, and it's signed, “Accepted by Stone.”

The Referee: Where does Hedgeside, the Bankrupt, fit into the picture?

Mr. La Shelle: Because the goods that were sold under [722] that contract happened to be in storage at Hedgeside. That's all. They might be in storage some place else. We might have made a contract

(Testimony of Earl Johnson.)

with "A" in New Orleans, and stored it in there. The Trustee is claiming, somebody else is claiming it, but we have got the right to show what our claim is based upon.

We are not saying that Hedgeside has a notice of that. We are not trying to introduce that as notice to anybody. We are introducing that as saying we have got a contract with "A". "A", under this contract, sold us goods, and here is our evidence of title and shows our payment.

The Referee: Yes, but still, let's get back to this document. Why wouldn't you be just as well off to furnish the Court with a copy of a contract with a company, Roma Wine Company and the Cresta Blanca, and somebody else?

Mr. La Shelle: Yes, but that's an inter-office deal.

The Referee: My point is, show me where this document is connected with the Bankrupt.

Mr. La Shelle: Because we are showing, or attempting to show, title to certain property, that this contract under which we bought it, and that we made payment for it.

The Referee: Yes, but have you looked at the names of the contracting parties?

Mr. La Shelle: Yes. We are not claiming that Hedgeside sold this goods.

Mr. Fisk: Who are you claiming sold the goods?

Mr. La Shelle: Sold as an individual.

Mr. Fisk: You're claiming that, under these

(Testimony of Earl Johnson.)

documents you put in here, the portion was sold to you by Stone as an individual, is that right?

Mr. La Shelle: That's right. But Stone as an individual, and he wasn't even operating at Hedgeside. And later on, as it states here, "this contract is made to you as an individual, but it is agreed by us that you are now completing the formation of the Corporation and the conveyance of certain properties thereto as planned, and that this contract, although made with you as an individual, is to be assigned to said Corporation upon the formation thereof, and that, in such case, you, as an individual, will no longer be liable under the terms, and for any breach of this contract."

Mr. Fisk: I don't think it's necessary to read that——

Mr. La Shelle: Wait a minute, the second contract on October 13, 1947, with Franciscan was following it as a Corporation. Now, we are introducing invoices from Franciscan. We bought this. Now, we are not trying to say that that was sold to us by the Bankrupt. Our only claim in connection with this merchandise is this: Hedgeside took, as a warehouseman, certain stuff in there that we claim is ours. You will not deliver it, so we petition in bankruptcy for its deliverance. It might have been just that we bought from somebody in Boston. We are entitled to show, insofar as we [724] can, how we came to acquire that stuff. As a matter of fact, we've got to do it.

Now, we're not trying to bind the Bankrupt Es-

(Testimony of Earl Johnson.)

tate as a party to this contract. But the Bankrupt Estate, through the Trustee and his attorney, says: "Well, you set up these barrels and that they belong to you. How did you acquire them? What proof have you got that you bought them?" And we're going to do it, and there is only one way, one way to do it. We have a contract with "A", he sold us the stuff, we bought it, and we stored it with you.

Now, your legal problem that arises out of those facts, that's something else again.

Mr. Fisk: At least, there is nothing in this record up to the present moment to show through any kind of method that Schenley has purchased and paid for any goods, wares or merchandise of any kind or character from R. I. Stone, unless Counsel is willing to stipulate that R. I. Stone was both Hedgeside and Franciscan. If he's willing to stipulate to that, I will let the contract go in Evidence.

Mr. La Shelle: I won't make any such stipulation. We contend directly to the contrary.

Mr. Fisk: But he has got nothing to show that he has bought any goods, wares, or merchandise on the face of the document from Stone. Therefore, this contract is wholly irrelevant, incompetent, and immaterial, and hasn't [725] been connected up to this proceeding.

Mr. La Shelle: Here is the situation, Your Honor: We can't put in everything at once.

The Referee: Off the record.

(Discussion off the record.)

The Referee: Back on the record. Mr. La Shelle,

(Testimony of Earl Johnson.)

you have furnished the Court with four original Exhibits, marked for Identification, and you made some statement with reference to furnishing the Court with photostatic copies.

Mr. La Shelle: I'll look them over tonight, and in the meantime, I suggest the Court retain the originals.

The Referee: Let the record show, then, that Mr. La Shelle has turned over to the Court the originals, Petitioner's Exhibit 23, 24, 25-A, and 25-B, all for Identification.

Mr. Fisk: And may the record show, I think it does, that we have an objection to be entered to the other three documents that are offered, but I think they should be treated with separately, and at the present time I have entered an objection to 23 for Identification.

The Referee: Very well.

* * * * * [726]

EARL JOHNSON

previously sworn, resumed the witness stand and testified further as follows:

Further Direct Examination

Mr. La Shelle: Q. Mr. Johnson, I'll hand you the originals of what purports to be warehouse receipts numbers 3381-B, 3383-B, 3384-B, 3385-B, 3392-B, 3393-B, 3398-B, 3399-B, 3400-B, 3402-B, 3403-B, 3407-B, which are the first group of warehouse receipts on the top of Schedule——

(Discussion off the record.)

(Testimony of Earl Johnson.)

Mr. La Shelle: For the benefit of Court and Counsel, the group that I have here is this group right here.

The Referee: Referring to——

Mr. La Shelle: I think that is 34; no, that's my office copy. I think it's Petitioner's Exhibit Number 34.

Mr. Walsh: 34 for Identification.

The Referee: That's 34. That's merely showing the Schedule.

Mr. La Shelle: Yes.

The Referee: But what Exhibit are you referring to for Identification, with reference to the warehouse receipts? [758]

Mr. La Shelle: It's that group—30, I think.

The Referee: So we are referring to Number 34 for Identification as a guide, and in the testimony Mr. Johnson is referring to Petitioner's Exhibit Number 30 for Identification in your examination.

Mr. La Shelle: That's right. And as a guide, it's the first group of warehouse receipts on the left, the numbers that I just read off.

Q. Mr. Johnson, I show you here those warehouse receipts in that group that I just read off, and for the purpose of the questions which I am now going to ask you, except for the purpose of Identification, I am not questioning you about the warehouse receipts themselves; I say that for the benefit of Court and Counsel, as they will be authenticated by another witness. Now, with reference to these warehouse receipts and these documents that

(Testimony of Earl Johnson.)

are pinned to them, did you assemble those at the request of Mr. Woolsey of Schenley?

A. Yes, I did.

Q. And with reference to the supporting documents, that is, these documents outside of the warehouse receipt, where did you get the supporting documents?

The Referee: What is that, Mr. La Shelle? Where?

Mr. La Shelle: Where did you get them?

The Witness: I'll have to inspect them.

Mr. Fisk: Just a minute, I'll object to that as calling for the conclusion of the witness as to what are [759] supporting documents.

The Referee: That part may go out. Where did you get the documents that you have?

Mr. Walsh: And for the purpose of the record, I think he should identify them.

The Referee: Identify the documents, and then tell us where you got them, and leave your conclusion out as to whether they are supporting documents.

Mr. La Shelle: Instead of using the word "supporting," supposing I use the word "attached documents"?

The Referee: As far as that statement is concerned, Mr. La Shelle, that will be in order, but in answer to Mr. Walsh's suggestion, we should have the documents identified that he is going to testify about.

(Testimony of Earl Johnson.)

Mr. La Shelle: All right, take the first warehouse receipt 3381.

The Witness: 3381-B.

Mr. La Shelle: There are certain documents attached to that, are there not?

A. That's right.

Q. And will you enumerate what those documents are, or what they purport to be?

A. The first document attached is a cancelled check in the amount of \$2,584.39, check number SB-90391, drawn to the order of the National City Bank of New York. That check was obtained by myself upon the request from our New York office, Internal [760] Audit Department.

Q. What is the next one?

A. The second document is a copy of a voucher, Schenley Distillers Corporation, number SB-90391, in amount of \$2,584.39, showing payment to the National City Bank of New York. That was obtained from the Accounts Payable Department, New York office, upon my request.

Q. May I interrupt there for a moment? Is that what you call a voucher copy of a check?

A. That's right.

Q. In other words, the check is a copy of the top part?

A. The check is the original; the voucher is a copy.

Q. I see. All right.

A. Third, attached is a copy of a draft, dated March 30, 1947.

(Testimony of Earl Johnson.)

The Referee: March what?

The Witness: March 20, 1947, furnishing information, 15 days from above date, pay to the order of the American Trust—

The Referee: The draft is the best evidence.

Mr. Walsh: Well, Your Honor, please, just identify it.

The Referee: Sustained. Just identify it.

The Witness: Do you want the amounts?

The Referee: Just identify the document, because the draft itself is the best evidence.

The Witness: It's drawn for \$2,584.39; the fourth [761] document is an invoice received from Franciscan Farm and Livestock Company—

Mr. Walsh: Just a minute. I ask that last statement go out.

The Referee: Sustained.

Mr. La Shelle: Just state what it is.

A. It's an invoice, with heading Franciscan Farm and Livestock Company, in the amount of \$1,228.56.

The Referee: Invoice number 141.

The Witness: Invoice number 141. The next is, numerical order, is an invoice with the subheading, Franciscan Farm and Livestock Company, invoice number 140, in amount of \$1,355.83; and last is a copy termed, Accounting Distribution, reference number 3-903—I don't know whether that's 81 or 91—in amount of \$2,584.39.

Mr. La Shelle: Q. Now, with reference to the remaining warehouse receipts, I notice that—

(Testimony of Earl Johnson.)

The Referee: Mr. La Shelle, for the purpose of clarity, with reference to the remaining warehouse receipts from 3381-B to 3407-B, as shown in Petitioner's Exhibit for Identification Number 34, in all the remaining—

Mr. La Shelle: Oh, yes, of this group, I mean.

Q. With reference to these documents that you just mentioned, the warehouse receipt number 3381, I think you told us where you got the cancelled check; where did you get the rest of the documents?

A. The remaining documents, or documents following the cancelled check, were obtained on my request from the New York office, Schenley Accounts Payable Department.

Mr. Walsh: Now, just a minute, Your Honor please. I ask that last statement go out, in the Accounts Payable Department. There is no evidence in the record—

Mr. Fisk: I join in that.

Mr. Walsh: —that these came from the Accounts Payable Department.

The Referee: Well, I will sustain the objection, Mr. Walsh, and to clarify the matter, where did the voucher come from, where did you get it?

A. From the New York office.

Mr. Walsh: Now, just a minute, if Your Honor—

The Referee: Where did you get it yourself?

A. From the mail.

Q. Who made the request for it?

A. I did, I believe. There were a number of

(Testimony of Earl Johnson.)

documents which were received directly on my request; there were some few documents which were obtained by Mr. Woolsey on his request. I don't recall exactly which ones were——

Q. Well, you see, now, Mr. Walsh raises the question here. You did testify as to where the check came from, and as I recall it, you also testified about the warehouse receipts. Now, in addition to that, we have a voucher, we have a sight draft, we have what purports to be invoice number 141 and [763] invoice 140, so when you say the other documents came from New York or some place else, Mr. Walsh wants to know where those other four documents came from, or at whose request, or all about it.

A. All of the documents in support of payment——

Q. Well, now, just a minute. Pardon my interruption, Mr. Johnson——

Mr. La Shelle: Q. Never mind support; the documents attached. Use the word "attached."

A. All of the documents attached to warehouse receipt number 3381-B, with the exception of the cancelled check, were obtained through the mail after I had requested that they be submitted to me from our New York office. They were all attached. They were all part of one file attached to this voucher copy.

The Referee: The originals or the photostatic copies, or what?

(Testimony of Earl Johnson.)

A. I am talking about the originals now. The originals as attached to the original 3381-B.

Mr. Walsh: May I make a statement for the record?

The Referee: Yes, Mr. Walsh.

Mr. Walsh: Your Honor, please, if what the witness states is true, there should be the letter of request and the letter of transmittal from the New York office showing that.

The Referee: How was your request made, Mr. Johnson?

A. There were a number of requests, because some of these were [764] gotten at different times as I built the schedules, some of my first requests were by telephone, some of my requests were written or letters with copies to the Chief Accounting officer in New York and copies to the Accounts Payable Department.

Q. Did you send the letters to New York?

A. I sent the letters, yes.

Q. Do you have copies of the letters where you requested certain documents?

A. I don't believe I have those with me.

Q. But do you have them?

A. I do have copies of those letters, yes.

Q. As Mr. Walsh suggests, do you have letters of transmittal from the New York office back to you, enclosing certain documents?

A. In some instances. I don't know whether I have them in all instances or not. Some of these were obtained in rush and just enclosed, and they

(Testimony of Earl Johnson.)

were sent to me air mail, special delivery, on my telephone request.

The Referee: Mr. La Shelle, will you have Mr. Johnson—will he be finished with his testimony—

Mr. La Shelle: Today?

The Referee: Well, Mr. Walsh and Mr. Fisk will still have an opportunity to get at him, so to speak, in further hearings.

Mr. La Shelle: He'll not finish today, I'll guarantee that. [765]

The Referee: As long as you are guaranteeing things, will you also guarantee to the Court and Counsel that you will have Mr. Johnson furnish letters where he requested documents of the New York office, and letters of transmittal from the New York office back here?

Mr. La Shelle: I will do so, if the Court instructs me. I don't think they are competent for this reason. The witness has already stated under a long voir dire and also direct, that he knows where these documents should be preserved and he went there and he got them. I don't say that he went there personally, that he looked for them there, requested them, got some of them out here locally, himself, and the rest in New York. These were original documents. They speak for themselves. As a matter of fact, I question whether it's of any particular importance that there be any qualifying evidence about them, because the cancelled check and the original invoices and cancelled drafts here speak for themselves. They are what

(Testimony of Earl Johnson.)

they purport to be. If the Court instructs me to have those here, what we have, we will be glad to produce, but I object to the fact that—I do not think they are competent or even necessary in this case.

The Referee: Well, they are not being offered, Mr. La Shelle, but Mr. Walsh has just made a comment to the effect that Mr. Johnson requested certain documents from New York, that there must be a request. Now, Mr. Johnson said that, [766] in some instances, the request was by 'phone; others, it was by mail. He said that he did make certain requests by mail—did you, Mr. Johnson?

A. Yes.

The Referee: And in those instances, you said that you do have copies of your letters of request, but you do not have them with you, is that correct?

A. Yes.

Q. And you also stated, when I asked you, that in some instances, when these documents were forwarded from the New York office to the West Coast office, that there was a letter of transmittal from the New York office back here to you, is that correct?

A. That's right. I can't tell, of course, how many or how many instances were by telephone or otherwise.

The Referee: I am not asking you to do that, Mr. Johnson. Even if you made a search and only found one or two, I am not saying anything about that. But prior to the next hearing, you make a

(Testimony of Earl Johnson.)

search of the copies where you requested documents, and also the letters of transmittal, which will be originals from the New York office; so that Mr. Walsh and Mr. Fisk will have an opportunity to examine those letters. No one is passing at this time whether they are admissible or not admissible, but Mr. La Shelle has said to the Court that he is not concealing anything. He wants them to have the full picture. Now, Mr. Walsh, you may go on.

Mr. Walsh: You have answered my question by your statement.

Mr. Fisk: Well, if it will add anything to the proceeding, I will state that the documents are not being offered in Evidence, I understand, Counsel. But the way to introduce documents that are records of a corporation, as I insist that these are, that is some of them are, is by the custodian of the records. This witness has admitted he is not a custodian of the records.

The second thing is, there is nothing in this record that shows either the mode of preparation or the time when they were paid under the Business Entries Rule that is required before evidence of this character is offered.

Mr. La Shelle: May I suggest there is nothing before the Court?

Mr. Fisk: I am saying—introduced my statement with the fact that I am making this objection now.

Mr. La Shelle: I don't want to have my exami-

(Testimony of Earl Johnson.)

nation interrupted. There is nothing before the Court.

The Referee: Yes, there is, Mr. La Shelle. Mr. Walsh made a request, and the Court has instructed the witness to do certain things.

Mr. La Shelle: That's the end of it.

The Referee: No, it isn't. At the same time of the interruption, when I interrupted you and Mr. Walsh, Mr. Fisk is also commenting on this proposition. Now, I anticipate [768] what you are going to say, but Mr. Fisk has an opportunity to complete his statement.

Mr. Fisk: The purpose of my statement is this: A question arose as to whether or not proof of the character requested would be requested here, and I say, in the interest of saving time, that when these are offered, if they are offered I am going to make those objections, if Counsel relies on this kind of testimony to get them in. That's the purpose of my statement.

The Referee: Mr. Fisk, isn't this a fact, that prior to Mr. La Shelle calling our attention to this Exhibit, that sets for the warehouse receipts and all the pertinent information that he considers pertinent in Petitioner's Number 34 for Identification, and prior to going into either 30 or 31 for Identification, he said, "I am not offering these Exhibits at this time; I have another witness for that purpose." Is that correct?

Mr. La Shelle: That was with respect to the warehouse receipts, and some of these others, these

(Testimony of Earl Johnson.)

letters changing warehouse receipts. There will be other witnesses to authenticate warehouse receipts and the letters in which they were changed.

Mr. Fisk: The purpose of my statement was simply when, as, and if, these documents are offered in Evidence, if they are offered with this kind of a background, I don't want it said to me at that time that when I had an opportunity [769] to request the documents that would support his position I said nothing. Now, I am simply saying that, if they are put in or attempted to be put in that way, I am going to make an objection on that ground. Now, if it has no relevancy, why, then that's—

Mr. La Shelle: If something is to be done, I will do something—

The Referee: Mr. La Shelle, I think Mr. Fisk is making a new request. He doesn't want to prolong the discussion here or your case at this particular time, but he doesn't want to, in his silence, he doesn't want to be precluded at a later date by having you say, "Well, the time for you to make your objection was when Mr. Johnson was on the stand and when we were talking about Petitioner's for Identification Exhibit Number 30 and 31.

Mr. La Shelle: That will be understood, then.

The Referee: Very well.

Mr. La Shelle: Q. Now, Mr. Johnson, on the 3 of this group, I notice that there are some warehouse receipts, to which there is nothing attached, other than a small, pencil memorandum.

(Testimony of Earl Johnson.)

A. That's right.

Q. And is that memorandum in your — did you make those memoranda?

A. In most instances, I made them. I was working with one of my men, a man who works for me, and in some instances I had him prepare the memorandum as I called it to him, so [770] there will be other writing in there. I prepared them in effect.

Q. What I am getting at is this: Will you explain to the Court, in assembling this group here, on warehouse receipt number 3381, there are two invoices, one cancelled draft, and one cancelled check; I want you to explain to the Court how and why you grouped these together, and why on the next warehouse receipt there are no attached papers, other than that memorandum—just so that you can explain it to the Court how they're grouped.

A. Well, each warehouse receipt calls for a certain specified number or quantity of barrels, with certain serial numbers pertaining thereto. In assembling the data, I attempted to take the invoices which covered payment for the serial numbers shown on the warehouse receipt, and attached them to that particular warehouse receipt.

However, it was found that in some instances, one invoice would have more barrels, and it would be necessary to cross-reference certain barrels to other warehouse receipts. And I couldn't attach one invoice to more than one warehouse receipt, so that

(Testimony of Earl Johnson.)

after completing what I thought were the first documents in a series, as I came across warehouse receipts where the documents were in the previous attachment, I made a little reference note, referring to the previous warehouse receipt, showing that the documents in support were attached to the preceding warehouse receipt number and referring [771] to the serial numbers which appeared on those attached documents.

Mr. Fisk: Your Honor, I am going to move to strike out the witness' testimony, because here is an attempt to put in a self-serving, written document, prepared by this witness—for the purpose of this proceeding to put it in as testimony in this case. And I submit that is not the way to introduce evidence, and his testimony in that regard should be stricken.

The Referee: Well, Mr. Fisk, unless I did not understand the witness, in effect, what he is saying is that, even though he does have an original warehouse receipt without certain other documents as he would have in 3381, nevertheless the other documents that are a part of this next warehouse receipt that Mr. La Shelle asked him about are here, but they, of necessity, cannot be attached to all of the warehouse receipts at once. They're attached to one warehouse receipt, and not all of them; is that—

Mr. La Shelle: That's it, exactly.

The Referee: But the documents are here, re-

(Testimony of Earl Johnson.)

ardless of what warehouse receipt they're attached to.

Mr. La Shelle: That's right. In other words, it is simply an explanation, so that the Court can check the serial numbers and see what the documents are that are supporting them, because if you have one invoice covered by two warehouse receipts, obviously you can't attach one invoice to two things.

Mr. Fisk: I submit that with these documents is a small pencil memorandum, made out by this witness. There is one with each set, or most of the sets, at any rate. I submit that it is not a proper method of introducing in Evidence at a proceeding for a witness to sit down in advance and write out what connection the various documents are that may be offered in a proceeding, and then offer testimony in the proceeding and testify to it, and put it into the record. I submit it is improper in every manner, shape and form.

The Referee: Well, Mr. Fisk——

Mr. Fisk: It's a matter for argument of Counsel.

The Referee: I think that Mr. La Shelle would be willing that pencil or pen memorandum go out, the only reason he has it in there is so the Court, when this matter is finally submitted, instead of groping through all these documents to find out where are the documents that apply to warehouse receipt number so-and-so, that he has a pencil notation in there, and take a look at it, so-and-so——

Mr. Fisk: That is a matter for Counsel to pre-

(Testimony of Earl Johnson.)

sent in his argument to the Court. It is not a matter for the witness to testify to on the stand.

Mr. La Shelle: If it please the Court, those are offered for the sole purpose of the Court's convenience, and also Counsel's convenience, by way of an index to the Court, so that the Court can follow, just as you said, the Exhibits. [773] It is unfortunate that the transactions of business natures of this kind, when warehouse receipts sometimes cover five or six invoices and then go on to another warehouse receipt. I am only trying to make the Court's job easy. I am certainly not relying on this pencil memorandum to make my case, and will so stipulate.

Mr. Fisk: The witness need not testify into the record regarding it. If he wants to submit that later, that's all right, but to testify into the record as to what these documents are and how they were prepared, and what they purport to hold, is not proper testimony.

Mr. La Shelle: I submit that it is, for the purpose for which it is offered.

Mr. Fisk: I submit my motion.

The Referee: Well, in the light of Mr. Fisk's objection, the Court will have to sustain it, and in sustaining it when this matter is finally submitted the Court will have to go groping through all of these other documents, which I am willing to do. I understand the problem, Mr. La Shelle, and I understand that one warehouse receipt may be connected with certain other, as you call them

(Testimony of Earl Johnson.)

supporting documents, and if they don't want those pencil notations in there, they certainly are not original documents. Some of them are made by Mr. Johnson for the help of the Court and you and I, and some of them are made by someone under his direction. If Mr. Fisk doesn't want them in there, take [774] them out.

Mr. Fisk: If Your Honor please, I don't want the Court to think for one moment that I want to put any undue burden on the Court in going over these records because it is going to be a burden. On the other hand, I have got to have some protection from the standpoint of my client, and I submit that this method of testifying in a case is wholly improper, and the same thing can be accomplished in a proper way, so the Court will not have that burden without attempting to put it on through the witness at this time. I mean, it's purely a mechanical problem that Mr. La Shelle can get from Mr. Johnson on the outside and explain to the Court in whatever form of briefing he wants to.

The Referee: Mr. Fisk, I sustained your objection.

Mr. La Shelle: I ask, Your Honor, that it's recess time. I would like Your Honor to reserve ruling on that, because I think I have a case here that I will get during the recess that will solve this problem.

The Referee: We will have a recess.

(A brief recess was taken.)

After Recess.

(Testimony of Earl Johnson.)

Mr. Fisk: If your Honor, in regard to the matter before the Court at the close of the last session, if the Court feels it gets any benefit out of that testimony, I'll withdraw my objection, provided it is with the understanding [775] that at some later time I think that it is used to an extent that is objectionable from my client's point of view, I will be in a position to object. However, I say it's in the interest—I think I am correct in my objection, but in the interest of seeing that the evidence is before the Court, that the Court has the full benefit of what he wants in the proceedings, I'll withdraw it at this time.

The Referee: Well, Mr. Fisk, I thank you seriously for the withdrawal of your objection, but even in the face of the withdrawal the Court is still of the opinion that it is not admissible, and that Mr. La Shelle can cover the same point with reference to informing the Court as to where to look for what the Petitioner contends are supporting documents, in a statement to be made by him, and the Court is sustaining the objection.

Mr. La Shelle: Well, may it please the Court, I would like to cite this case to the Court.

The Referee: Very well.

Mr. La Shelle: Which I think the Court will find of some help in the premises, and which I think is directly in point. It's the case of *U. S. versus Mortimer*, 118 Federal Reporter, 2nd Series, at page 266, in which it was an action for using the mails to defraud a criminal prosecution, and in that case

(Testimony of Earl Johnson.)

an accountant had introduced a number of charts and tables, showing these transactions, and at page 269, in Syllabus 6 and 7, it states: (Reading): [776]

“The most serious objection, technically, is that made to the admission in evidence of a number of charts purporting to show defaults in the payment of taxes on a high proportion of the mortgaged properties. These charts had been prepared by the prosecution witness Karcher, an experienced public accountant, assisted by several aides, of whom only one, in addition to Karcher, took the stand. One more seems to have been in the courtroom; the others were outside the district and at a distance at the time of the trial.”

Then, I am reading further from the bottom of what I consider to be the pertinent parts here:

“The voluminous material summarized by the charts was itself extracted from a great number of tax record books of each of the metropolitan counties. Not only would the production of those books have been a practical impossibility, but the procurement of either certified copies or title company abstracts, as authorized by the New York Civil Practice Act, Sec. 382, 385, of those records, involving hundreds of procedures of land, would have been most expensive, as well as disruptive of the activities of the record offices and burdensome upon the Court. * * * But appellant argues most strenuously that all of Karcher’s aides should have been called.”

The Court then goes on to state that that was un-

(Testimony of Earl Johnson.)

necessary, that he supervised and that his testimony is enough. They say here:

“There are numerous cases holding admissible on the testimony of a supervising agent statements compiled from voluminous records according to a method at once practicable and offering reasonable guaranty of accuracy, even though the supervisor had not examined each record himself.”

And then we come here to the most important part, which I believe is directly at point in this case. They cite cases to that effect and then they say:

“The only possible reason for asserting that these authorities are not quite controlling is that these cannot be business entries, since they were made in preparing evidence for this trial, and, indeed the case of Morton Butler Timber Co. versus United States (giving the citation) does say as a ground for affirming a ruling made below, that entries ‘made apparently for exclusive use as evidence in this case’ were, therefore, not in the regular course of business. This ruling is, however, condemned by Wigmore as ‘unsound’; the men who made them were acting in the regular course of their employment.”

5 Wigmore on Evidence, and so forth. [778]

“And it is opposed to the leading case of Northern Pacific Railroad Co. versus Keyes, *supra*, where the tables in question were prepared for the particular case.”

Now, we have these little notations, although

(Testimony of Earl Johnson.)

each one is a separate piece of paper, attached to a warehouse receipt that doesn't have an attached document; they are put together, a table and a chart, prepared by this witness and under his supervision, for the purpose of indexing this evidence; and under the authority of that case, not only are they admissible but these charts themselves are admissible. I am not offering these at this time, because I am not through with them, but I submit to Your Honor that that little index there is a guide to the serial numbers and barrels and warehouse receipts and invoice numbers and checks, so that you can check them, that it is a part of a chart and table prepared by this witness in exactly the same manner as that case, and it is therefore admissible in Evidence.

The Referee: Mr. La Shelle, that isn't the way I understand your reading that case. I'll go further. We have the evidence in here already, according to your case, if you are going to prove it. Those charts in there, or that other memorandum was based upon——

Mr. La Shelle: Well, yes, in this particular case.

The Referee: You have already, according to you, [779] you have the documents here.

Mr. La Shelle: We are offering a lot more than they offered in that case.

The Referee: But you have the documents here before the Court.

Mr. La Shelle: That's quite right, and we are just trying to give the Court an aid and an index

(Testimony of Earl Johnson.)

of reading those documents, as you said, so if there is nothing to this, there is a little note saying where you will find it. Now, I submit, particularly in view of Mr. Fisk's statement withdrawing any objection to that, that those should stay in there, because it is much easier for the Court.

Now, I am not going to be looking at these in my briefing; you are going to be looking at these in your briefing.

The Referee: I want to ask you a couple of questions, Mr. La Shelle, and you are not on the stand.

First of all, isn't it a fact that either the original supporting documents or photostatic copies thereof, of the original documents, either have been introduced for Identification or Evidence, or——

Mr. La Shelle: And will do so.

The Referee: And will do so, isn't that true.

Mr. La Shelle: That's right, dead right.

The Referee: Number two, the memoranda that were prepared were by Mr. Johnson, or by someone under his supervision, [780] will merely refer to those original documents, or photostatic copies thereof, is that true?

Mr. La Shelle: That's true, that's very true.

The Referee: So the only purpose whatsoever— Pardon me, before I make that statement. And by your own admission, the only reason that you want to offer these memoranda is as a guide to the Court, but not to be considered in any way as evidence?

(Testimony of Earl Johnson.)

Mr. La Shelle: Yes, they're a guide to the Court. They're an index, is all they are.

The Referee: But not as evidence?

Mr. La Shelle: I certainly wouldn't want to rely on them.

The Referee: Well, now, answer my question now: Is it merely as a guide to the Court? Let's just use that as an example?

Mr. La Shelle: May I offer this as a suggestion? Assuming for the moment that the original documents go in Evidence, we can solve this problem by having it understood in the record that those pencilled, little memoranda like that are simply for Identification and not Evidence.

The Referee: Well, then, if they're only for Identification, then I don't suppose that Counsel will have any objection?

Mr. Walsh: I have no objection.

The Referee: Mr. Fisk? [781]

Mr. Fisk: Your Honor, I have already withdrawn my objection. I don't want to gild the lily, but I can't see, for the very reason that the Court has outlined, how the case cited by Counsel has anything to do whatsoever with what we are talking about here. In the first place, it doesn't appear that the witness who made out the charts was a party to the case; and, in the second place, it shows on the very reading by Counsel that the evidence was almost impossible to produce because of its complexity and so forth, and so that was a substitute

(Testimony of Earl Johnson.)

for the producing of evidence which could otherwise not be produced.

Here, Counsel has got the evidence before him, and he is doing nothing but arguing his case with the witness. Now, I assume, if it isn't overdone, it won't hurt me, and I withdraw my objection on that account; but, if at some time it's abused in my opinion, I would like to be in a position to object.

The Referee: Mr. Walsh?

Mr. Walsh: I have no objection, Your Honor.

The Referee: Well, now, I still have to have the matter clarified, because the Court is a little in doubt on account of sustaining the objection, and then having the objection withdrawn, and then in line with Mr. La Shelle's statement with reference as to whether or not it was going to be construed as evidence or merely as an aid to the Court, and then having Mr. Fisk and Mr. Walsh—[782]

Mr. Fisk: I will have this to offer to the Court: I will either withdraw my objection or leave it there, according to what the Court thinks will less confuse this proceeding from the standpoint of judging the case.

The Referee: Well, then, the Court will consider that all of these pencilled memoranda—I assume there is more than one, Mr. La Shelle?

Mr. La Shelle: Yes, there's one on each warehouse receipt that doesn't have any other attachment in the way of an invoice.

The Referee: Then, the Court will consider all of these memoranda, prepared by Mr. Johnson or

(Testimony of Earl Johnson.)

someone under his supervision or someone else, merely for Identification purposes, and not in Evidence.

Mr. La Shelle: That's perfectly satisfactory.

Mr. Fisk: And the testimony of the witness in this proceeding will be entirely independent of those memoranda.

The Referee: Mr. La Shelle, did you hear Mr. Fisk's statement?

Mr. La Shelle: No, what was that?

Mr. Fisk: I say, and the testimony of the witness will be entirely independent of the written memoranda.

Mr. La Shelle: Well, I don't understand what you mean by that.

The Referee: Well, what Mr. Fisk is saying is, if [783] you have a warehouse receipt, for instance 3383, and it has a pencil or a pen memorandum attached to it, and it says that the warehouse receipt is affected or is a part of supporting document so-and-so and so-and-so, Mr. Fisk wants it definitely understood that that pencil memoranda means nothing with reference to where to look or where to find, as far as evidence is concerned.

Mr. Fisk: Yes, and when the witness gives testimony about that receipt, he is not testifying as to the contents of his memorandum, but as to the documents themselves.

The Referee: Mr. La Shelle?

Mr. La Shelle: That's all right.

The Referee: Very well.